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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-763

CAMELIA BUILDERS, INC., E. J. YELVERTON, JR., FARNALE, INC., R. L. GOODALE and JEFFREY H. HUBBARD,

Petitioners,

versus

FIDELITY MORTGAGE INVESTORS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No.

CAMELIA BUILDERS, INC., E. J. YELVERTON, JR., FARNALE, INC., R. L. GOODALE and JEFFREY H. HUBBARD,

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FIDELITY MORTGAGE INVESTORS,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioners — CAMELIA BUILDERS, INC., E. J. YELVERTON, JR., FARNALE, INC., R. L. GOODALE and JEFFREY H. HUBBARD — pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit adjudging Petitioners guilty of civil contempt for violation of Rule 11-44 of the Chapter 11 Rules of Bankruptcy.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit has not yet been reported. It is reproduced in Appendix I to this Petition.

The opinion of the District Court has not yet been reported. It is reproduced in Appendix III to this Petition.

The opinion of the Bankruptcy Court has been reported and appears at Vol. I, Bankruptcy Court Decision, p. 1188, and is reproduced in Appendix IV to this Petition.

JURISDICTION

The judgment of the Court below (Appendix I) was entered on September 3, 1976. A timely petition for rehearing was denied on November 5, 1976 (Appendix II). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

(1) Whether the Bankruptcy Court and District Court are without jurisdiction to adjudicate civil contempt predicated upon violation of Rule 11-44 of the Chapter XI Rules.

(2) Is the Bankruptcy Court without jurisdiction of Petitioners or the subject matter?

(3) Whether the bases of the holdings of the courts below is in conflict with the decisions of this Court and other Courts of Appeal.

(4) Is the meaning of Rule 11-44 sufficiently clear as to be the basis for an adjudication of contempt where a contractor moves to preserve his lien in the face of a foreclosure by deed of trust sale?

(5) Is there no evidence or insufficient evidence to establish that Petitioners are guilty?

(6) Are findings of fact in a contempt proceeding subject to a clearly erroneous rule?

(7) May a Contractor institute suit pursuant to 28 U.S.C. 959 in response to conduct of a debtor in possession which threatens to adversely affect the mechanic's and materialmen's lien of Contractor?

(8) Does an apparent conflict of interest by legal counsel offend the concept of due process of law?

(9) Whether legal counsel for the Contractor may be subject to the penalty of contempt for attempting to protect the Contractor's lien.

(10) Is a person charged with contempt denied due process of law when he is tried by one court and sentenced by a second court?

(11) Did FMI, by its failure to notify Petitioners of the Chapter XI proceedings waive its right to stay Petitioners?

(12) Is Bankruptcy Rule 11-44 unconstitutional as applied because it deprives the Contractor, at least temporarily, of its property without notice of hearing?

(13) Does the law of the place of Petitioners' residence (Texas) apply in a contempt proceeding in New York?

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

The constitutional provision involved is the Fifth Amendment to the United States Constitution as set out in Appendix X.

The statutory provisions involved are: 11 U.S.C. 69, 18 U.S.C. 401, 11 U.S.C. 1(9), 28 U.S.C. 959, 11 U.S.C. 707, 11 U.S.C. 107, 11 U.S.C. 711, 11 U.S.C. 41, 11 U.S.C. 46 and 28 U.S.C. 2075, these statutes are set out in Appendix V attached hereto. The Bankruptcy Rules involved under Title 11, Chapters 1 to 7 of the United States Code are Rule 215, Rule 920, Rule 770, Rule 401, Rule 601, Rule 810, Rule 602 and Rule 903 which are set out in Appendix VII. Bankruptcy Rules 11-44, 11-24 and 13-401 under Title 11, Chapters 11 and 13 of the United States Code are set out in Appendix VIII. The Federal Rules of Civil Procedure involved are Rules 70, 37 and 45 which are set out in Appendix VI. Mississippi statutes involved are Mississippi Code Annotated of 1972, § 85-7-105, § 85-7-131, § 85-7-101 and § 89-1-55 set out in Appendix IX.

STATEMENT OF THE CASE

This case involves an Application (Application) to the Bankruptcy Court for the Southern District of New York by Fidelity Mortgage Investors (FMI) operating as Debtor in Possession under Chapter XI of the Bankruptcy Act to hold Camelia Builders, Inc., E. J. Yelverton, Jr., Farnale, Inc., R. L. Goodale, Jeffrey H. Hubbard and Thomas W. Crockett, Jr., (Petitioners), guilty of civil contempt by reason of the filing of a lawsuit by Camelia Builders, Inc. — Farnale, Inc., a Joint Venture (Contractor) against FMI in the United States District Court for the Southern District of Mississippi (federal action). Petitioner Hubbard is legal counsel for Farnale, Inc., Camelia Builders, Inc. and the Contractor. R. L. Goodale and E. J. Yelverton, Jr. were officers of the corporate Petitioners and the Joint Venture. At time of hearing on the Application, FMI voluntarily dismissed as to Mr. Crockett who was counsel for Camelia Builders, Inc., E. J. Yelverton and the Contractor. The Joint Venture has not been made a part to the proceedings.

The Contractor, a Texas entity, was the general contractor for a construction project located in Jackson, Mississippi. Camelia Bay Corporation (Developer), unrelated to Camelia Builders, Inc., was the Owner of the project having a leasehold interest in the real property. FMI was the interim lender of the Developer and the beneficiary of a deed of trust lien on the leasehold estate. Contractor had filed a mechanic's and materialman's lien against the property in 1974 and instituted an action in the Rankin County Court of Mississippi (State Court Action) in January 1975 to foreclose the lien and to determine the superiority of competing lien rights and named therein FMI. Thereafter FMI filed a petition under Chapter XI on or about January 30, 1975. The Contractor instituted the federal action on March 24, 1975 to protect its lien after FMI caused the trustee of the deed of trust to commence proceedings to foreclose the deed of trust lien by Trustee's sale.

A hearing was held in the federal action on March 26, 1975 at which time the Court permitted the Trustee's sale to proceed provided the trustee deposit in the registry of the Court from the proceeds of the sale the sum of $75,964.33 representing the amount of the mechanic's and materialmen's lien of the Contractor. The Trustee's sale was conducted on March 27, 1975 and thereafter the trustee did deposit $75,964.33 in the registry of the Court.

The basis for the Application is an alleged violation of Rule 11-44 of the Chapter XI Rules in that the Petitioners, with actual knowledge of the pending Chapter XI proceeding of FMI commenced the federal action for the alleged purpose of enforcing a lien on the property of FMI.

After Petitioners were required to personally appear before the Bankruptcy Court and show cause pursuant to Rule 920 of the Bankruptcy Rules why they should not be adjudged guilty of civil contempt by reason of the alleged violation of Rule 11-44 of the Chapter XI Rules, the Bankruptcy Court determined in its Decision of Proceeding to Certify for Contempt (Decision) (Appendix IV) Petitioners were guilty of civil contempt, concluded that their conduct should result in more than the limited punishment permissible under Rule 920 and certified the matter to the United States District Court by issuing an Order to Show Cause Why Petitioners Should Not be Adjudged Guilty of Civil Contempt (Show Cause Order) (Appendix IV) requiring Respondents to personally appear before the said District Court.

At time of hearing on the Show Cause Order, FMI offered in evidence the Certificate of Facts Showing Contempt of the Bankruptcy Court (Appendix IV) and rested and Petitioners motioned for a directed verdict. The District Court ruled that the proceeding was an appeal, denied the motion to dismiss and in an Order Under Bankruptcy Rule 920(a)(4) Adjudging Petitioners Guilty of Civil Contempt (Judgment) (Appendix III) found Petitioners guilty of civil contempt based upon the Certificate of Facts of the Bankruptcy Court, ordered that Petitioners take all appropriate action to effectuate the return of $75,694.33 deposited by trustee in the registry of the Court in the federal action to FMI and assessed as costs all attorneys' fees of FMI against Petitioners, jointly and severally, and the Court of Appeals for the Second Circuit, with one judge dissenting, affirmed the Judgments.

REASONS FOR GRANTING THE WRIT

1. The Bankruptcy Court And District Court Are Without Jurisdiction To Adjudicate Civil Contempt Predicated Upon Violation Of Rule 11-44 Of The Chapter XI Rules.

The order of the District Court adjudging Petitioners guilty of civil contempt was entered pursuant to Bankruptcy Rule 920(a)(4). The full text of Bankruptcy Rule 920 is set out in the appendix hereto but the pertinent subparagraph reads as follows:

> "(4) Certification to District Judge. If it appears to a Referee that conduct prohibited by Section 41a of the Act may warrant punishment by imprisonment or by fine of more than $250, he may certify the facts to the District Judge. On such certification the Judge shall proceed as for a contempt not committed in his presence."

The conduct described in Section 41a of the Act, 11 U.S.C. 69 (Appendix V) includes in pertinent part:

> "(a) A person shall not, in proceedings before a Referee, (1) disobey or resist any lawful order, process or writ; . . ."
>
> (b) The Referee shall forthwith certify the facts to the judge, if any person shall do any of the things forbidden in this section . . ."

Said language is in contrast to the language relating to the contempt power of a District Court as defined in 18 U.S.C. 401 (Appendix V) which provides in pertinent part:

> "A Court of the United States shall have the power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other as, —
>
> (3) disobedience or resistance to its lawful writ, process, order, *rule*, decree or command." (Emphasis added.)

The Bankruptcy Rules, in a manner similar to the Federal Rules of Civil Procedure, have been promulgated by this Court pursuant to 28 U.S.C. 2075 which provides:

> "The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure under the Bankruptcy Act.
>
> Such Rules shall not abridge, enlarge, or modify any substantive right.
>
> Such Rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May and until the expiration of 90 days after they have been thus reported.
>
> All laws in conflict with such Rules shall be of no further force or effect after such rules have taken effect."

It appears significant that this Court in providing for the sanction of contempt in connection with both Bankruptcy Rules and the Federal Rules of Civil Procedure limits same to instances where there is a prior order of the Court based upon such rule (Rule 37, F.R.C.P., Rule 70, F.R.C.P. (Appendix VI) and Bankruptcy Rule 770 (Appendix VII)) or the issuance of process under seal of the Court. Rule 45, F.R.C.P. (Appendix VI) It seems inconsistent to specifically provide for the power of contempt in the limited instances if a violation of any rule may be the basis for an adjudication of contempt.

Thus, it clearly appears that while a District Court sitting as such has available to it by reason of 18 U.S.C. 401 the sanction of contempt for a violation of its rules, the jurisdiction of a Court of Bankruptcy including a District Court when so sitting to impose the sanction of contempt or the power of the Bankruptcy Court to certify contempt proceeding and the power of the District Court to proceed on such certification is limited to violations of orders, writs and processes and does not include rules. Such construction of 11 U.S.C. 69 was adopted in *Wakefield v. Housel,* 288 F. 712, 717 (8th Cir. 1923) in the following language:

> "The jurisdiction of the Referee to issue such a certificate is granted and limited by that section which provides that the Referee may make the certificate 'if any person shall do any of the things forbidden in this section.' Obviously he has no jurisdiction if any person shall do anything not forbidden by that section."

And in a case where the allegation was that the bankrupt committed perjury in testifying before the Referee it was held that as 11 U.S.C. 69 does not include

perjury the Court was without jurisdiction to impose the sanction of contempt. *Magen v. Campbell,* 186 F. 675 (3rd Cir. 1911).

11 U.S.C. 69 has been amended by Congress since the decisions in *Magen* and *Wakefield, supra,* but such amendment in no way affected the decisions or sought to expand the limited jurisdictional grant contained in the statute with the result that the only reasonable conclusion to be drawn is that the holdings of *Magen* and *Wakefield, supra,* have the approval of Congress. In this connection, the contempt powers of a Federal Court having been specifically limited by statute should not be extended beyond the plain terms of the statute which grants them. *Denver-Greeley Valley Water Users Assn. v. McNiel,* 131 F.2d 67 (10th Cir. 1942). To Petitioners the issue of jurisdiction does not seem overly formalistic for a Court either has the power to act or it does not and to argue that the Court cannot act unless the power be implied as does the Second Circuit in this instance simply begs the issue for Bankruptcy Rule 903 providing that the rules are to be construed to secure the expeditious and speedy processing of bankruptcy proceedings cannot expand the jurisdiction of the Court. 28 U.S.C. 2075, *supra.*

2. The Bankruptcy Court Is Without Jurisdiction Of Petitioners Or The Subject Matter.

The contractor was not the creditor of FMI but rather a creditor of the developer and was not scheduled by FMI as a creditor until late in July, 1975. All property rights, if any, of FMI in connection with the deed of trust for the project in Jackson, Mississippi were in custodia legis of the State Court prior to the institution of the Chapter XI

proceeding. Consequently, the Bankruptcy Court is without jurisdiction to enjoin the proceedings. *Straton v. New,* 283 U.S. 318, 51 S.Ct. 465, 75 L.Ed. 1060 (1931). In this connection, there is no issue presented as to the four month rule for 11 U.S.C. 107 (Appendix V) provides in pertinent part as follows:

> "(b) The provisions of Section 96 of this Title to the contrary notwithstanding . . . statutory liens in favor of . . . contractors, mechanics . . . created or recognized by the laws of . . . any State, may be valid against the Trustee, even though arising or perfected while the debtor is insolvent or within four months prior to the filing of the Petition initiating a proceeding under this Title . . ."

The Second Circuit appears to have misconstrued the entire nature of the proceeding before them as evidenced by their reliance on 6 Collier, *Bankruptcy* 3.03 at 424 (14th Ed. 1972) which pertains to corporate reorganizations as opposed to Chapter XI Petitions for Arrangement which may only affect unsecured creditors. 11 U.S.C. 707 (Appendix V) In this connection, the Second Circuit in its opinion appears to have misread Section 311 of the Bankruptcy Act, 11 U.S.C. 711 (Appendix V) which provides:

> "*Where not inconsistent with the provisions of this Chapter,* the Court in which the Petition is filed shall, for the purposes of this Chapter, have exclusive jurisdiction of the debtor and his property, wherever located." (emphasis added)

Prior to the holding of the Second Circuit in this case, it appears to have been universally recognized that the

Bankruptcy Court did not have jurisdiction to enjoin lienholders in the case of competing liens as was noted in the concurring opinion in *In Re: A. Roth Co.*, 125 F.2d 396, 398 (7th Cir. 1942):

> "I have never understood that A wanting to foreclose a mortgage on property owner by B had to get consent of the Bankruptcy Court to foreclose that mortgage, or to make a Trustee in Bankruptcy a party, simply because he, the bankrupt, also had a mortgage on B's property."

In the case of *Town of Agawam v. Connors*, 159 F.2d 360 (1st Cir. 1947), *cert. denied*, 330 U.S. 845, 67 S.Ct. 1806, 91 L.Ed. 1290 (1947) where the City had brought suit to foreclose a right of redemption in a State Court and thereafter bankruptcy proceedings were commenced it was held that the trustee acquired an interest no larger than that of the bankrupt, that is a property interest subject to the prior jurisdiction of the State Court observing at Page 364 of its opinion:

> "It is not less subject to the jurisdiction of the Land Court because the bankrupt continued in possession."

and concluded that the Bankruptcy Court lacked jurisdiction to issue a restraining order as to the State Court proceeding. In *Brunn v. Wichser*, 75 F.2d 25 (3rd Cir. 1934) it was held to be essential that the lien be on the property of the debtor otherwise there is no jurisdiction to enjoin any act or proceeding to enforce the lien, and in the case involving competing lien rights of subcontractors and a contractor who had invoked the protection of the Bankruptcy Act it was held that the only remedy was in the State Court proceeding. *In Re: Grissler*, 136 F. 754 (2nd Cir. 1905).

3. Consideration By This Court Is Necessary On The Independent Ground That The Bases Of The Holding Of The Court Below Is In Conflict With The Decisions Of This Court And Other Courts Of Appeal.

The conclusion of the Second Circuit that the State Court proceeding instituted by the contractor prior to the Chapter XI proceeding did not preempt subsequent assumption of jurisdiction by the Bankruptcy Court is in conflict with this Court's decision in *Straton v. New, supra.* In this connection, the authority cited by the Second Circuit, 6 Collier, *Bankruptcy* Para. 3.03 at 424 (14th Ed. 1972) is inapplicable as same relates to a Chapter X corporate reorganization.

The holding of the Court below to the effect that Petitioners must cause the $75,964.33 now in the registry of the Federal Court to be paid over to FMI renders this contempt proceeding in conflict with the decision of this Court announced in *Maggio v. Zeitz*, 333 U.S. 56, 92 L.Ed. 476, 68 S.Ct. 401 (1948) and *In Re: Rubin*, 378 F.2d 104 (3rd Cir. 1967) to the effect that all property issues must be disposed of prior to institution of contempt proceedings.

The holding of the Court below to the effect that contempt proceedings will lie pursuant to Section 41a of the Act (11 U.S.C. 69) for violation of a rule is in direct conflict to the holdings in *Magen v. Campbell* supra and *Wakefield v. Housel, supra.*

The holding of the Court below to the effect that the Bankruptcy Court has jurisdiction in the case of competing lien claimants is in direct conflict with *In Re: A.*

Roth Co., 125 F.2d 396 (7th Cir. 1942); *Town of Agawam v. Connors*, 159 F.2d 360 (1st Cir. 1947), *cert. denied*, 330 U.S. 845, 67 S.Ct. 1806, 91 L.Ed. 1290 (1947); *Brunn v. Wichser*, 75 F.2d 25 (3rd Cir. 1934); and *In Re: Stanndco Developers, Inc.*, 534 F.2d 1050 (2nd Cir. 1976) to the effect that the Bankruptcy Court has no jurisdiction to restrain State Court proceedings seeking to enforce liens on property not belonging to the debtor.

The holding of the Court below to the effect that the only proper forum of the Contractor for protection against the consequences of FMI's attempted foreclosure was the Bankruptcy Court is in conflict with *Perry v. Wood*, 63 F.2d 257 (5th Cir. 1933) and *In Re: Grissler*, 136 F. 754 (2nd Cir. 1905) wherein it was held that where the only property right of the Trustee was a lien and a materialman had filed a notice of lien and made the Trustee a party to the action to foreclose same, the lien of the bankrupt could not be enforced by a Trustee in a Court of Bankruptcy and he must resort to the State Court unless the adverse parties consent to be sued in the Bankruptcy Court. In this connection, this Court announced in *Hicks v. Knost*, 178 U.S. 541, 20 S.Ct. 1006, 44 L.Ed. 1183 (1900) that lienholders, unless they surrender their securities and prove their claims, are strangers to the bankruptcy proceeding and are entitled to have their property rights adjudicated by the court of the state in which such property is situated. To the same effect see *Taylor v. Carryl*, 61 U.S. (20 How.) 589, 15 L.Ed. 1028 (1858). The decision of the Second Circuit on this question, particularly in a contempt proceeding, is puzzling as it has previously held in *In Re: Willax*, 93 F.2d 293 (2nd Cir. 1937) that the Bankruptcy Court is without jurisdiction to prevent a mechanic's and materialmen's lien claimant from perfecting and protecting its lien and in fact held that the failure to do so results in loss of the lien.

In holding Rule 11-44 of the Chapter XI Rules applicable to the Federal action, the decision of the Court below is in direct conflict with the holding of *Mid Jersey National Bank v. Fidelity Mortgage Investors*, 518 F.2d 640 (3rd Cir. 1975). If the reasoning of the Second Circuit herein were applied in the *Mid Jersey* case it would appear that as an unsecured creditor, Mid Jersey National Bank had obtained a judgment against FMI within four months of the filing of the Chapter XI Petition and as FMI had made a security deposit against execution pending a successful appeal by FMI which execution was no longer available to Mid Jersey National Bank by reason of the Chapter XI arrangement that there is $300,000, which might otherwise be available to FMI with the result that Rule 11-44 is applicable but instead the Third Circuit held that said $300,000 was in custodia legis and the filing of the Chapter XI proceeding could not oust the jurisdiction of the Court in connection with said funds.

The holding of the Court below to the effect that where the Bankruptcy Court certifies the facts to the District Court, in a contempt proceeding, no independent fact finding hearing is required to be held before the District Court is in direct conflict with the decision in *In Re: McIntosh*, 73 F.2d 908 (9th Cir. 1934).

The holding of the Court below to the effect that counsel for Contractor is subject to the penalty of contempt is in conflict with the decisions of this Court in *In Re: Watts & Sachs*, 190 U.S. 1, 23 S.Ct. 718, 47 L.Ed. 933 (1903), as all conduct of counsel was in the capacity of an advocate, *Imbler v. Pachtman*, ___ U.S. ___, 96 S.Ct. 984, ___ L.Ed. ___ (1976).

4. The Meaning Of Rule 11-44 Is Not Sufficiently Clear As To Be The Basis For An

Adjudication Of Contempt Where A Contractor Moves To Preserve His Lien In The Face Of A Foreclosure By Deed Of Trust Sale.

Prior to the enactment of Rule 11-44 it was clear that the Bankruptcy Court had authority in a Chapter XI proceeding to stay the commencement or continuation of suits; an example of such an order was contained in 10 Collier, *Bankruptcy*, p. 1104, Form 3501 which provides in part: ". . . all persons be . . . enjoined . . . from commencing . . . any *suit* . . ." (Emphasis added).

As originally drafted (The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Bankruptcy Rules and Official Forms under Chapter XI of the Bankruptcy Act which was published by the U.S. Government Printing Office in Washington, D.C., October 1972) Rule 11-44 provided in part as set forth on page 56 of said publication that a petition filed ". . . shall operate as a stay of the commencement or continuation of any *action* against the Debtor." (Emphasis added). Said language is similar to the language used in Rule 401 and Rule 13-401 (Appendix VIII) of the Bankruptcy Rules. After the original draft, Rule 11-44 was changed to provide only ". . . any *court* or other proceeding . . ." (Emphasis added) as opposed to "suits" or "actions." Apparently, the only other language contained in the Bankruptcy Rules pertaining to automatic stays is contained in Rule 601 which provides in part ". . . any court proceeding . . . or other legal or equitable processes or proceedings." (Rule 10-601, containing language similar to Rule 11-44, has been promulgated subsequent to the occurrence of all events involved herein).

In this connection, whereas Rule 13-401 (Appendix VIII) is to be given the broadest possible meaning, it does not use the word "court"; neither does Rule 401 use the word "court." The word "court" is a word of art as used in Bankruptcy law for the reason that same is defined in 11 U.S.C. 1(9) to mean the judge or referee of the Court of Bankruptcy in which the proceedings are pending. It is clear from the history of Rule 11-44 aforesaid that the word "court" has been purposefully substituted for the word "action" and that the phrase "or other legal or equitable processes or proceedings" has similarly been purposefully deleted from said rule. Obviously then, Rule 11-44 relates to conduct that is different from that contemplated by Rules 401, 601 or 13-401 and thus leaves said conduct undefined. Civil contempt does not lie for a violation of an order of court unless the order is clear and decisive and contains no doubt about what it requires to be done. *N.L.R.B. v. Deena Artware, Inc.*, 261 F.2d 503 (6th Cir. 1958), *rev'd on other grounds*, 361 U.S. 398, 80 S.Ct. 441, 4 L.Ed.2d 400 (1960).

As was noted by the Court in reversing a conviction of contempt of driver salesmen for interfering with "routes" that were found by the District Court to be the property of a debtor in Chapter XI:

> ". . . the order which is said to have been violated must be specific and definite." *In Re: Rubin*, 378 F.2d 104, 108 (3rd Cir. 1967).

As it has been held that the Bankruptcy Court has no jurisdiction to enjoin:

(1) a lienholder from instituting suit against the owner of the property and naming the bankrupt who also

held a lien against said property in the suit; *In Re: A. Roth Co.*, 125 F.2d 396 (7th Cir. 1942)

(2) a claimant who has previously instituted suit in state court to determine the rights of a party in real estate; *Town of Agawam v. Connors*, 159 F.2d 360 (1st Cir. 1947), *cert. denied*, 330 U.S. 845, 67 S.Ct. 1806, 91 L.Ed. 1290 (1947), *Straton v. New*, 283 U.S. 318, 51 S.Ct. 465, 75 L.Ed. 1060 (1931).

(3) Rule 11-44 is inapplicable to a lawsuit that will not affect any property subject to the jurisdiction of the Bankruptcy Court, *Mid Jersey National Bank v. Fidelity Mortgage Investors*, 518 F.2d 640 (3rd Cir. 1975), and

(4) as 28 U.S.C. 959 (Appendix V) authorized suit without leave of the Bankruptcy Court, *Thompson v. Texas Mex. Ry.*, 328 U.S. 134, 66 S.Ct. 937, 90 L.Ed. 1132 (1946), it does appear that it cannot be said as a matter of law that Rule 11-44 can leave no doubt that the Mississippi Action would be a violation of the stay contemplated therein.

5. There Is No Evidence Or Insufficient Evidence To Establish Petitioners Are Guilty.

The Courts below have concluded:

1. That Petitioners sought an order in the federal action enjoining FMI from conducting a non judicial sale while the Complaint therein demonstrates that the Contractor sought an order to show cause pertaining to its lien rights or in the alternative funds held in trust by FMI

for the benefit of the Contractor. The only injunction sought pertained to final relief and was limited to ". . . the property and improvements that are the basis of this lawsuit . . . ." *i.e.*, the mechanic's and materialman's lien or trust funds in the amount of $75,964.33.

2. That Petitioners knew of FMI's Chapter XI proceeding on the day the federal action was filed based upon their own testimony. While there is testimony that a cause number for the Chapter XI was obtained after filing the federal action it was coupled with the advice of the office of the Bankruptcy Court in New York to the effect that: "There are no other papers other than the petition, there are no orders on file in this cause".

3. That relief was available under Rule 11-44(e), yet the only evidence is that because of the press of time and doubt as to whether or not FMI was in Chapter XI it was not logistically possible to travel to New York and still have time to return to Mississippi if there was no Chapter XI and same has been asserted by Respondents without denial thereof by FMI in the briefs.

4. The conclusion of the Bankruptcy Court that reliance upon 28 U.S.C. 959 was an afterthought brought to light after the event for the purpose of justifying the violation of Rule 11-44 when the Complaint filed in the Mississippi Action states on Page 2 in Count 1:

> ". . . bring this cause of action pursuant to 28 U.S.C. 959."

5. That the Mississippi Action sought to enforce a prepetition indebtedness when the debt is owing by the Developer to the Contractor and is secured by a mechanic's and materialmen's lien on property owned by the Developer.

In addition to the advice that no order had been entered, there were other suspicious circumstances pertaining to the Chapter XI proceeding in New York, including:

(a) FMI at all times material hereto was known by Petitioners to have its principal place of business in Jacksonville, Florida rather than New York.

In fact, on or about September 1975 FMI filed a Stipulation of Fact in FMI v. Camelia Bay Corporation, et al, In the Circuit Court of The First Judicial District of Hinds County, Mississippi, Cause No. 22,-870 stating that the principal business office of FMI is Jacksonville, Florida.

(b) Petitioners received no formal notice of the proceedings from either FMI or the Bankruptcy Court.

(c) The only notice of any nature received was a newspaper article and an unverified plea in abatement filed in a state court proceeding which alleged the Chapter XI but failed to give a cause number for the said arrangement proceedings and contained no exhibits.

(d) That the lawyer who filed the aforesaid plea in abatement had previously filed mechanics and materialmen's liens on behalf of subcontractors of the Contractor and was co-partner in the law firm conducting the foreclosure with the result that he was contending for competing lien rights.

(e) No effort was made by FMI to apprise Petitioners of the Chapter XI after the filing of the Mississippi Action until the conclusion of the evidence in the hearing had in the Mississippi Action though FMI did have time to prepare and gather evidence to defend on the merits as demonstrated by two affidavits dated March 26, 1975 entered in the Mississippi Action by FMI.

(f) That a copy of the petition under Chapter XI had not been recorded in Rankin County, Mississippi. Bankruptcy Rule 602.

In the event the Courts below elect to disbelieve all of the testimony of Petitioners herein still the only affirmative admissible evidence of knowledge of the Chapter XI proceedings consists of an unsworn pleading filed in a state court without exhibits alleging the Chapter XI proceeding but failing to give the cause number of same, and an approximate four line article in the Wall Street Journal making reference to a Fidelity Mortgage filing bankruptcy in New York which evidence is insufficient as a matter of law to charge knowledge of the Chapter XI proceeding, for knowledge within the meaning of the law, consists of credible information on material facts. *Sackett v. Farmer's State Bank of Boone*, 228 N.W. 51 (Iowa 1929).

Knowledge is an indispensable element of contempt, *In Re: Rubin, supra.* It does appear that to charge an at-

torney whose duty is to contend for the rights of his client to $75,964.33 with knowledge of the Chapter XI based upon the facts of this case would establish an onerous burden upon all advocates and may have the effect on creditors in the future of denying to clients their right to counsel.

Additionally as Rule 11-44(c) of the Chapter 11 Rules provides:

> "At the expiration of thirty days after the first date set for the first meeting of creditors, a stay provided by this rule other than a stay against lien enforcement shall be deemed annulled as against any creditor whose claim has not been listed in the schedules and who has not filed his claim by that time.

And as there is no evidence that the thirty day period contemplated thereby had not expired at the time of filing of the federal action, as the Contractor had neither been listed in the schedules nor filed his claim and as the law suits did not enforce a lien against FMI, there is no evidence of a violation of Rule 11-44 of the Chapter 11 Rules.

6. Findings Of Fact In A Contempt Proceeding Are Not Subject To The Clearly Erroneous Rule.

At time of hearing herein before the District Court on August 19, 1975 FMI offered into evidence the Certificate of Facts Showing Contempt made by the Bankruptcy Judge and rested its case. In response thereto, Petitioners motioned for directed verdict on the grounds that there was no evidence of contempt as the Certificate of the

referee constitutes at most a mere pleading and the prosecution has the burden of proving contempt where a certificate is answered by pleading not guilty. *In Re: McIntosh*, 73 F.2d 908 (9th Cir. 1934). The Courts below rely upon Bankruptcy Rule 810, which Rule provides in part:

> "Upon an appeal the district court may affirm, modify or reverse a referee's judgment or order or removal with instructions for further proceedings. The court shall accept the referee's findings of fact unless they are clearly erroneous . . . ."

for its authority that it must accept the referee's findings of fact unless they are clearly erroneous and concludes said Certificate is evidence and not clearly erroneous.

In the instant case there is neither a judgment nor order of the referee nor is there an appeal. The clearly erroneous rule has no application to a certificate of facts in contempt as the certificate is merely the means of informing the District Court of the alleged contempt and is not binding nor does it conclude the District Court's action in any manner. *O'Hagan v. Blythe*, 354 F.2d 83 (2nd Cir. 1965). In the instant case, as the authority to punish rests in the hands of the District Court, the District Court in considering the issue must exercise its sole independent judgment in deciding facts and reaching conclusions and consequently the rule announced in *O'Hagan v. Blythe, supra*, remains applicable in the instant case. In this connection, there appears to be no matter in the Bankruptcy Rules which purports to change 11 U.S.C. 69(b) (Appendix V) which provides in part upon certificate that:

> "The judge shall thereupon, in a summary manner, hear the evidence . . . ."

and same is reinforced by the provisions of Bankruptcy Rule 920 (Appendix VII) which provides in the case of certification:

> "(4) . . . the judge shall proceed as for a contempt not committed in his presence."

The referee's findings are to ". . . be subject to a wholly independent judicial review." *In Re: Rubin,* 378 F.2d 104, 108 (3rd Cir. 1967). It follows that there was no evidence or insufficient evidence before the District Court to adjudge Respondents in contempt.

7. A Contractor May Institute Suit Pursuant To 28 U.S.C. 959 In Response To Conduct Of A Debtor In Possession Which Threatens To Adversely Affect The Mechanic's And Materialmen's Lien Of Contractor.

At the time of institution of the federal action, the Contractor had a mechanic's and materialmen's lien and FMI was the beneficiary of a deed of trust lien against a leasehold estate in property, the legal title of which was in the Developer who was then in possession.

Please recall that while the mechanic's and materialmen's lien for $75,694.33 arises from nonpayment by the Owner, FMI did not advance said sum to the Owner; that is the lien is for work for which FMI did not advance funds.

The Supreme Court of Mississippi has held in the case of a deed of trust where the lender was irrevocably bound to make advances and it was the parties expressed intention that the deed of trust be paramount, that still the mechanic's and materialmen's lien is given priority except to the extent that money secured by the deed of trust was actually used in paying for construction. *Weiss, Deryfous & Seiferth v. Natchez Inv. Co.,* 140 So. 736 (Miss. Div. A 1932) As the need to protect the priority of the deed of trust where the lender is irrevocably bound to advance funds appears to be more compelling than where the lender is not so bound it does clearly appear that in Mississippi the mechanic's and materialmen's lien of the Joint Venture is superior to the deed of trust lien of which FMI is beneficiary, but it is clear under Mississippi law that the failure of the Joint Venture to protect its lien rights will result in their loss. *First National Bank of Greenville v. Virden,* 45 So.2d 268, 271 (S.Ct. Miss. en banc 1950)

While there is no case directly in point, the lien statutes of Mississippi are not unlike those of Texas where it is held that as to movables installed within a building, the mechanic's and materialmen's lien rights are superior to a deed of trust lien. *First National Bank in Dallas v. Whirlpool Corp.,* 517 S.W.2d 262 (Tex. 1975)

The lien of the Joint Venture arises pursuant to both §85-7-101 and § 85-7-131 of the Mississippi Code of 1972 (Appendix IX) providing the contractor with a lien on the buildings constructed and the movables therein installed by the contracor such as kitchen cabinets, garbage disposals, stove, plumbing fixtures, etc. *Billups v. Beeker's Welding & Machinery Co.,* 189 So. 526 (S.Ct. Miss. Div. B 1939) to the effect that where Owner of

property declared bankruptcy property passed to Trustee subject to mechanic's and materialmen's lien.

Of course, the Contractor's lien is valid against a Debtor in Possession without regard to the four month rule, 11 U.S.C. 107(b) (Appendix V) but pursuant to § 85-7-105 Mississippi Code of 1972 (Appendix IX), the lien as to movables exists only while the property is in possession of the Owner or one deriving title through the owner. As stated in *Billups v. Beeker's Welding, supra,* at page 530:

> "The lien was retained . . . and enforceable while the property remained in the hands of the then owner, Myles Gravel Co., or while in the hands of one deriving title or possession through said gravel company with notice that the indebtedness represented by the mechanic's lien was unpaid."

Once FMI caused the trustee of the deed of trust to commence nonjudicial foreclosure, the Joint Venture was presented with the prospect of a new owner deriving its title through the Trustee of the deed of trust which would have the effect of voiding the mechanic's and materialmen's lien. Under Mississippi practice such a foreclosure is an invitation to petition a court for an order to show cause why the trustee should not be required to conduct a judicial foreclosure otherwise the mechanic's and materialmen's lien is cut off. As Mr. James Young, Mississippi counsel for FMI in referring to the State Court action, stated:

> "Under the statutes made by the State of Mississippi, the complainants in that case have a

> right to seek to enjoin the foreclosure sale under Mississippi law by posting the proper bond and making the proper showing had they chosen so to do, and they had not chosen so to do, and we were not therefore under restriction and I commenced the foreclosure sale." (R. 33)

The courts below concluded that 28 U.S.C. 959 (Appendix V) is applicable only to suits related to "carrying on the business" connected with property entrusted to a Debtor and did not encompass the act of a lender in foreclosing on security to recover a defaulted loan and at variance with Mississippi law.

The Statute (28 U.S.C. 959) actually provides:

> "(a) Trustees, receivers or managers of any property, including debtors in possession, may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property. Such actions shall be subject to the general equity power of such court so far as the same may be necessary to the ends of justice, but this shall not deprive a litigant of his right to trial by jury.
>
> (b) A trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the

same manner that the owner or possessor thereof would be bound to do if in possession thereof."

In determining 28 U.S.C. 959 to be inapplicable to the federal action, the Courts below erroneously begin with the assumption that the Contractor was a creditor of FMI and concluded that Contractor was attempting to enhance its creditor position in the reorganization citing as authority therefor *Austrian v. Williams*, 216 F.2d 278 (2nd Cir. 1954), *cert. denied*, 348 U.S. 953 (1955). Same involved a suit against former officers and directors of the debtor for derelictions of their corporate responsibilities brought after obtaining leave of the reorganization Court and the Court held that the bringing of such suit was not carrying on business of the debtor, Central States Electric Corp., which was not in the business of suing its former officers. The Court states at page 285:

> "We consequently are not required to reach the question *subject to some dispute*, of the exact effect of 28 U.S.C. Section 959 on Chapter X proceedings as distinguished from ordinary bankruptcy proceedings." (emphasis added)

Though FMI was only authorized to conduct its business, the courts below determined the foreclosure was not a transaction in carrying on business connected with its property.

The Bankruptcy Court determined that the only authority of FMI to cause the foreclosure of the deed of trust other than its authority to conduct its business is Bankruptcy Rule 610 which provides:

> "The trustee or receiver may, with or without court approval, prosecute or enter his appearance and defend any pending action or proceeding by or against the bankrupt, or commence and prosecute any action or proceeding in behalf of the estate, before any tribunal."

and determined same was the basis for the foreclosure. Can there be any question that if FMI filed suit against the Contractor in Mississippi that the Contractor would then have a right to file an answer thereto or to assert any affirmative defense thereto or any compulsory counterclaim it may have without first going to New York to obtain leave of the Bankruptcy Court?

The Conclusion that Petitioners were only attempting to enhance a prepetition indebtedness fails to note: (1) that the indebtedness of $75,964.33 was owing from the Developer to the Contractor; (2) that there then existed an executory contract between FMI and the Contractor by the terms of which FMI holds $75,694.33 in trust for the benefit of the Joint Venture. *In Re: Liebig, Petition of Holley*, 255 F. 459 (2nd Cir. 1918); and (3) that the foreclosure adversely affects the Contractor's lien.

The federal Action, in response to the foreclosure which threatened to cut off the lien rights of the Contractor [Sec. 85-7-105 Mississippi Code of 1972] (Appendix IX) as same was being conducted at variance with the Mississippi law in that proper notice of the proposed sale was not given pursuant to Section 89-1-55, Mississippi Code of 1972 was properly instituted without consent of the Bankruptcy Court. 11 U.S.C. 46 (Appendix V). The blanket injunction contained in Rule 11-44 cannot affect Contractor's right to maintain suit under 28 U.S.C. 959, particularly where,

as in the instant case, there is no showing that prosecution of the Mississippi Action will embarrass the administration of FMI's estate. *Novo Enzyme Corp. v. Baker,* 361 F.Supp. 337 (S.D.N.Y. 1973). The Court in *Novo Enzyme Co., supra,* at page 339 quotes with approval the statement of the Court in *Diners Club, Inc. v. Blumb,* 421 F.2d 396 (9th Cir. 1970) to the effect that:

> "In any event, a blanket injunction issued automatically when the receiver or trustee is appointed is significantly different from an injunction against a particular suit, issued after an independent examination by the reorganization judge. The former involves no exercise of discretion with regard to any specific suit and may properly be regarded as a simple incident of the appointment of the receiver or trustee. Hence it is entitled to no greater weight in subsequent proceedings than the fact of appointment itself."

"We need not decide whether the scope of the discretion of the judge of the reorganization court is especially narrow when there is a question of enjoining a suit permitted by the first section of § 959. See 6 Collier, *Bankruptcy* ¶ 3.31(2) at 650 (14th Ed. 1969). For, regardless of the effect of § 959(a) there is a strong policy against enjoining suits in other courts except upon a satisfactory showing that prosecution of the action would embarrass the administration of the estate. *Foust v. Munson S.S. Lines,* 299 U.S. 77, 84, 57 S.Ct. 90, 81 L.Ed. 49 (1936), *Thompson v. Texas Mexican Ry.,* 328 U.S. 134, 140-141, 66 S.Ct. 937, 90 L.Ed. 1132 (1946). No such showing has been made here."

As advanced by Judge Learned Hand in *In Re: Commonwealth Bond Corp.,* 77 F.2d 308, at 309 (2nd Cir. 1935):

> "Stays must be ancillary to the main purpose of the proceeding and are *not lawful* when they cannot contribute to execution of the plan." (Emphasis added)

Perhaps this Court had this very issue in mind as it promulgated Bankruptcy Rule 11-24 which provides in pertinent part that the Bankruptcy Court shall give ten days notice of:

> "(2) any proposed sale of property, *other than in the ordinary course of business.*" (emphasis added)

The effect of the Rule is to provide all interested parties with an opportunity to such relief, it any they require, from the Bankruptcy Court in the event of a sale not in the ordinary course of business. But if no such notice is given, and none was given in the instant case, then it appears clear that the sale is taking place in the ordinary course of business and all interested parties have their remedies under 28 U.S.C. 959. On the other hand, if the District Court is correct in its reliance upon *In Re: American Associated Systems, Inc.,* 373 F.Supp. 977 (E.D. Ky. 1974) and the Bankruptcy Court is correct in relying upon Bankruptcy Rule 610, then it appears that a tort has been visited upon the Contractor by FMI in "furtherance of the bankruptcy business operations" in failing to give lawful notice and consequently the federal action is within the purview of 28 U.S.C. 959.

Any other construction will result in a mechanic's lien claimant in the amount of $500 being put to the election of

spending substantial sums to travel 2,000 miles to New York to protect his claim against an owner in a bankruptcy proceeding of the lender, protect his lien on real estate of the owner in Mississippi and pay $20,000 to the lender for his contempt, or lose his lien. Same does appear to cause a deprivation of property without due process of law.

8. An Apparent Conflict Of Interest By Legal Counsel Offends The Concept Of Due Process Of Law.

The Mississippi counsel for the Contractor was Mr. Thomas Crockett. Several requests were made of Mr. Crockett to determine if FMI had filed bankruptcy. He created in the mind of Petitioner Hubbard the impression FMI had not filed for relief under the federal bankruptcy laws. Mr. Crockett filed the federal action that was prepared by Petitioner Hubbard. Thereafter, all petitioners and Crockett were ordered to show cause by the bankruptcy court why they should not be adjudged guilty of civil contempt. At the commencement of the hearing thereon in New York, New York, Mr. Crockett was not present and FMI then announced its non suit as to Mr. Crockett. During the course of the hearing before the bankruptcy court, Mr. James Young, Mississippi counsel for FMI testified that Mr. Crockett was associated with him in the foreclosure of the deed of trust for the benefit of FMI. *In Re: T. L. Kelly Dry Goods Co.*, 102 F. 747 (E.D. Wis. 1900). *In Re: A & B*, 209 A.2d 101, 44 N.J. 331 (1965). *In Re: Waugh*, 95 F.2d 451 (7th Cir. 1938) *cert. denied*, 305 U.S. 610, 59 S.Ct. 69, 83 L.Ed. 388. Rule 215 of the Bankruptcy Rules. *Harmar Drive-In Theater v. Warner Bros. Pictures*, 239 F.2d 555 (2nd Cir. 1956), *rehearing denied*, 241 F.2d 937. It will appear to the Petitioners remarkable if conduct that should result in

suspension of the right to practice law can also give rise to a claim for damages. *Richardson v. State*, 192 So. 875 (Fla. Div. B. 1940).

9. Legal Counsel For The Contractor May Be Subject To The Penalty Of Contempt For Attempting To Protect The Contractor's Lien.

Petitioner Hubbard at all times material was legal counsel for the Contractor and to preserve and protect the lien rights of Contractor to secure the debt owing by the Developer caused the federal action to be filed. In *In Re: Watts & Sachs*, 190 U.S. 1, 23 S.Ct. 718, 47 L.Ed. 933 (1903), where lawyers advised their clients in good faith that state, not federal courts had bankruptcy jurisdiction over certain property in the hands of a state receiver this Court held that although the lawyers' advice was substantially incorrect, it would not allow the contempt convictions to stand because there was no evidence the advice was given in bad faith. While counsel to this date does not believe his advice to have been incorrect, at least all advice given and acts done were in good faith. As it is the obligation of an advocate to contend for the rights of his client, he is immune to civil liability. *Imbler v. Pachtman, supra.*

10. A Person Charged With Contempt Is Denied Due Process Of Law When He Is Tried By One Court And Sentenced By A Second Court.

Petitioners pursuant to an order of the Bankruptcy Court were directed:

"To show cause before me in Room 234 . . . why they should not be adjudged guilty of civil contempt . . ."

And hearing was held thereon April 10-11, 1975. Thereafter, on or about July 19, 1975 the Bankruptcy Court entered a "Decision of Proceeding to Certify for Contempt" (Appendix IV) and issued a second order directing Petitioners to show cause before the United States District Court for the Southern District of New York why they should not be adjudged guilty of civil contempt (Appendix IV) based on the certificate of facts showing contempt attached thereto, (Appendix IV). Despite the order to Petitioners to show cause, Petitioners were not permitted to testify before the District Court but the District Court determined from the Certificate of Facts prepared by the Bankruptcy Judge that Petitioners had intentionally violated the automatic stay provisions of Rule 11-44 of the Rules of Bankruptcy Procedure and were thus guilty of civil contempt, and assessed damages jointly and severally against Petitioners in the amount of approximately $20,000.

Bankruptcy Rule 920 provides in pertinent part:

"(2) Any other conduct prohibited by Sec. 41a of the Act may be punished by the referee only after hearing on notice.

(4) If it appears to a referee that conduct prohibited by 41a of the Act may warrant punishment by imprisonment or fine of more than $250 he may certify the facts to the District Judge. On such certification the Judge may proceed as for a contempt not committed in his presence."

Section 41b of the Act, 11 U.S.C. 69 pertaining to procedure provides in pertinent part:

"The Judge shall thereupon, in a summary manner, hear the evidence as to the acts complained of . . ."

The procedure is:

"Mandatory and must be followed to the letter." 2 Collier, *Bankruptcy*, Sec. 41.09, p. 1596 (14th Ed. 1962) and the failure to strictly follow same is fatal. In this connection, the certificate of facts are mere pleadings and do not constitute evidence. *In Re: McIntosh*, 73 F.2d 908 (9th Cir. 1934).

The effect of the procedure followed in the instant case is that Petitioners have been tried by the Bankruptcy Court, Judge Asa Herzog being the author of Rule 11-44 of the Bankruptcy Rules, (see The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Bankruptcy Rules and Official Forms under Chapter XI of the Bankruptcy Act published by the United States Government Printing Office, Washington, D.C., October 1972) and after his determination that Petitioners ". . . treated the rules so cavalierly as to constitute a complete disregard for the consequences of their conduct, and, "played fast and loose with the rules . . ." sent the matter forward to the District Court to have the punishment assessed. The effect is to place Petitioners twice in jeopardy for the same offense in derogation of the Fifth Amendment to the United States Constitution which provides in pertinent part:

". . . nor shall any person be subject to the same offense to be twice put in jeopardy of life or limb . . ." (Appendix X)

11. FMI, By Its Failure To Notify Petitioners Of The Chapter XI Proceedings Waived Its Right To Stay Petitioners.

That FMI was fully aware of the Joint Venture and its mechanic's and materialmen's lien at the time of filing of the Chapter XI on January 30, 1975 proceeding is conclusively demonstrated by the existence of the State Court proceeding brought to enforce the lien of the Joint Venture and in which FMI had been served prior to January 30, 1976.

The only effort made by FMI until the conclusion of the evidence in the Mississippi Action to notify the Joint Venture of the Chapter XI proceeding was the filing of an unsworn plea in the State Court lawsuit which contained no exhibits and omitted the cause number of the Chapter XI proceeding.

In regard to the failure of FMI to file a certified copy of its petition for Chapter XI with the Clerk in Rankin County, Mississippi as required by Bankruptcy Rule 602(a) or furnish a cause number in the plea in abatement as required by Bankruptcy Rule 602(b) it has been said:

> "But in denying this motion as to them, I prefer to place my decision upon the broader ground that those who procure an ex parte injunction, and make no efforts to serve it upon the persons who they claim shall be bound by it, though they are

> easily accessible, are not entitled to proceed for contempt upon any accidental, doubtful, and disputed notice of the injunction alleged to have been conveyed indirectly only through other persons. Parties designed to be bound by an injunction have a right to expect service in the ordinary way, if they are accessible; and if they are not so served, and no excuse for it appear, as to them the injunction should be deemed waived or as never in force." *In Re: Cary,* 10 F. 622 (S.D.N.Y. 1882)

In the event FMI had elected between January 30, 1975 and March 20, 1975 to comply with Bankruptcy Rule 602(a) which provides in pertinent part:

> "(a) REAL PROPERTY — As soon as possible after his qualification a receiver shall record a certified copy of the petition without schedules . . . in the office where transfers of real property are recorded in every county where the bankrupt has an interest in real property . . ."

And which is made applicable to a debtor in possession by Rule 11-44 of the Chapter 11 Rules, Petitioners would have had an opportunity to verify the Chapter 11 proceedings of FMI in time to approach the Bankruptcy Court concerning the situation created by the deed of trust foreclosure.

12. Bankruptcy Rule 11-44 Is Unconstitutional As Applied In That It Deprives The Contractor, At Least Temporarily, Of Its Property Without Notice Of Hearing.

Petitioners admittedly are not clear as to the meaning of Rule 11-44 but contend that said rule does not mean that FMI may, in violation of Mississippi law, take possession in Mississippi of property from an Owner indebted to the Contractor in the amount of $75,964.33, to which property the Contractor has a superior right at a time when FMI is in default on its obligations that are the basis of its beneficial interest in a deed of trust and then cause the Joint Venture to litigate its right as against FMI in New York. In the event any other construction is sought to be given to Rule 11-44 then in the instant case where the result will be to deprive the Contractor of the right, for any period of time (ie. from March 1975 until the present) to possession of its property it appears that the rule is unconstitutional in that it provides for temporary loss of possession without prior notice or hearing in connection therewith. *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969), *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972), *North Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975). In the instant case, it is crystal clear that even if the argument were advanced that Rule 11-44 should be construed to be applicable only upon the Court's entry of order authorizing FMI to operate its business rather than upon the mere filing of the petition, still there could not have been even ". . . a summary determination of relative rights of the disputing parties before stepping into the dispute . . ." *Fuentes* at 80, 92 S.Ct. 1994, because for whatever reason FMI may have had, it elected not to apprise this Court of the existence of the Joint Venture or Respondents until late in the month of March, 1975. Of course, in dicta, *Fuentes* does indicate that in certain extraordinary situations lack of notice and hearing may not be unconstitutional but one of the requirements therefor is a showing as applied to the Joint Venture of a special need

for very prompt action while in the instant case the foreclosure of FMI required a period of three weeks duration and again, the Bankruptcy Court was not apprised of the existence of the Joint Venture or Petitioners nor of their claim.

It has long been the rule in bankruptcy that there could be no sale of realty free and clear of other liens and encumbrances without prior notice and opportunity to be heard (FMI represented it was selling the property free and clear; that it had good title) and under Mississippi law the sale was cutting off the mechanic's and materialmen's lien of the Joint Venture, 85-7-105 of the Mississippi Code of 1972. And, of course:

> ". . . civil contempt falls with the order if it turns out to have been erroneously or wrongfully issued." *Cliett v. Hammonds*, 305 F.2d 565 at 570 (5th Cir. 1962) and Supreme Court cases cited therein.

13. The Law Of The Place Of Petitioners' Residence (Texas) Applies In A Contempt Proceeding In New York.

The party filing the federal action was the Contractor. Petitioner herein are only agents, representatives or legal counsel for same and under Texas Law have no personal liability for acts done on behalf of the Contractor except for deliberately inflicted personal injuries. Additionally, arguing without conceding that Petitioner knew of the Chapter XI proceeding and that an error in judgment, if any there be, does not exonerate them (*Freeman v. Ferguson*, 292 S.W.2d 632 [Texas 1956]), it is to be recalled that at all times material hereto Petitioners were logistically precluded from being able to effectively seek

relief from the Bankruptcy Court which is a good excuse for failure to comply. *Ex Parte Adair*, 222 S.W.2d 324 (Tex. Civ.App. — Dallas 1949).

CONCLUSION

For the foregoing reasons, Petitioners, Camelia Builders, Inc., E. J. Yelverton, Jr., Farnale, Inc., R. L. Goodale and Jeffrey H. Hubbard pray that this petition for a writ of certiorari be granted.

Respectfully submitted,

JEFFREY H. HUBBARD
& ASSOC., INC.

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CERTIFICATE OF SERVICE

I hereby certify that the prescribed number of copies of the foregoing Petition for a Writ of Certiorari have been served on Weil, Gotshal & Manges, (Mr. Michael L. Cook, Mr. Richard P. Krasnow and Mr. Philip H. Kalban), Attorneys for Respondent, Fidelity Mortgage Investors, 767 Fifth Avenue, New York, New York 10022, this ____ day of December, 1976.

JEFFREY H. HUBBARD

APPENDIX I

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1028—September Term, 1975

Argued: May 13, 1976 Decided: September 3, 1976

Docket No. 76-5007

IN RE:

FIDELITY MORTGAGE INVESTORS,
Debtors,

FIDELITY MORTGAGE INVESTORS,
Applicant-Appellee,

v.

CAMELIA BUILDERS, INC., E.J. YELVERTON, JR., FARNALE, INC., R.L. GOODALE AND JEFFERY H. HUBBARD,
Respondents-Appellants.

Before:

SMITH, MANSFIELD AND VAN GRAAFEILAND,
Circuit Judges.

Appeal from order and judgment in contempt proceeding in Chapter XI bankruptcy case in United States District Court for the Southern District of New York, Richard Owen, *Judge*, against appellants initiators of action in federal court in Mississippi without permission bankruptcy court to enforce liens against properties held under deed of trust by debtor-in-possession.

Affirmed.

JEFFERY H. HUBBARD, Houston, Texas, *for Appellants.*

MICHAEL COOK (Weil, Gotshal & Manges, New York, N.Y., Richard P. Krasnow, Philip H. Kalban, New York, N.Y., of counsel), *for Appellee.*

SMITH, *Circuit Judge:*

Fidelity Mortgage Investors (hereinafter, "FMI"), is a real estate investment trust organized under the laws of Massachusetts.[1] Like many other real estate investment trusts, FMI has not weathered the recent recession. As a result, FMI has been forced to file for reorganization under Chapter XI of the federal Bankruptcy Act, 11 U.S.C. §701, *et seq.* This appeal stems from events surrounding that reorganization.

Camelia Builders, Inc. (hereinafter, "Camelia") and Farnale, Inc. (hereinafter, "Farnale"), organized into a joint venture, have acted as general contractors for the construction of eighty condominium units in Jackson, Mississippi. FMI granted a construction loan to the developer of that condominium project.

When the developer of the Jackson condominium project ran into financial difficulties, FMI, Camelia and Farnale all found themselves with creditor interests in the partially-completed units. FMI, in return for the construction loan, had received a first deed of trust on the condominium project and the land on which it was to be built. Camelia and Farnale possessed materialmen's and

1. For the statutory definition of a real estate investment trust, see §856 of the Internal Revenue Code, 26 U.S.C. §856. For a discussion of the tax advantages of real estate investment trusts, see 7 Mertens, *Law of Federal Income Taxation* §41A.01 et seq. (1967); 1 Rabkin & Johnson, *Federal Income Gift and Estate Taxation* §2.15 (1963).

mechanic's liens by virtue of the labor and supplies they had furnished for the partially-completed condominiums.

Shortly after the financial problems of the Jackson condominium developer came to fruition, FMI was forced to confront the precariousness of its own financial situation. Accordingly, on January 30, 1975, FMI filed for Chapter XI reorganization in the United States District Court for the Southern District of New York.

The FMI petition evidently caused great concern to Camelia and Farnale who, as rival creditors, apparently viewed their lien interests in the Jackson condominium units as in potential conflict with FMI's deed trust in that same property. Hence, Camelia and Farnale began an action in the United States District Court for the Southern District of Mississippi (Walter M. Nixon, *Judge*) seeking to ensure the superiority of their lien claims in the Jackson property over any competing claims asserted by FMI as holder of the deed of trust. This federal action was brought by Camelia and Farnale on March 24, 1975, almost two months after FMI filed its Chapter XI petition in New York.

As a result of the federal action begun by Camelia and Farnale, FMI was required to deposit almost $76,000 with the Mississippi district court. FMI was also required to incur the costs of defending its interests in that lawsuit.

It is the position of FMI that Camelia and Farnale were barred by the Bankruptcy Rules from instituting an action in Mississippi without first securing permission from the bankruptcy judge in New York, who had two months earlier received FMI's Chapter XI petition. Accordingly, FMI moved in the New York bankruptcy court (Asa S. Herzog, *Judge*) that Camelia and Farnale be held in contempt for initiating the Mississippi action without first securing permission from the court in New York in

which FMI had earlier filed its Chapter XI petition.

Judge Herzog, after a hearing participated in by the parties, held both Camelia and Farnale in contempt for knowingly initiating the Mississippi action without his permission. The lawyers for Camelia and Farnale, as well as two corporate officers, were held in contempt also.

However, Judge Herzog, rather than punishing the contempt with the limited sanctions available to a bankruptcy judge, certified the matter to the United States District Court for the Southern District of New York (Richard Owen, *Judge*), pursuant to Rule 920(a)(4) of the Bankruptcy Rules. Judge Owen accepted Judge Herzog's factual findings, accordingly held the defendants in contempt and ordered that FMI be paid costs, including reasonable attorneys' fees for the defense of the Mississippi action and for the prosecution of the contempt proceeding. Judge Owen also ordered the defendants to cause the return of FMI's $76,000 deposit in the Mississippi district court.

Camelia, Farnale and the lawyers and officers held in contempt appeal from Judge Owen's order. They urge us, on a variety of juridictional, substantive, constitutional and procedural grounds, to reverse the decision of the district court as to both liability and punishment. We decline this invitation and affirm the contempt order of the district court in all respects.

I.

Before turning to the arguments advanced on appeal, it may be useful to review the statutory and regulatory scheme of which the defendant-appellants are adjudged in contempt.

Rule 11-44 of the Bankruptcy Rules mandates that a Chapter XI petition shall automatically stay other judicial proceedings against the debtor-in-possession except by

permission of the bankruptcy court with whom the Chapter XI petition is filed. Section 41(a) of the Bankruptcy Act, 11 U.S.C. §69(a), compels obedience to "any lawful order, process or writ" of a bankruptcy judge. Rule 920, premised upon the statutory authority of §41(a), permits bankruptcy judges to punish via contempt proceedings. Rule 920(a)(3) limits the contempt sanctions available to bankruptcy judges to fines not in excess of $250. However, Rule 920(a)(4) authorizes bankruptcy judges to certify contempt proceedings to district judges when it appears to the bankruptcy judges that greater sanctions are warranted.

District judges are not limited to the same contempt sanctions as bankruptcy judges.

Camelia and Farnale instituted their action in Mississippi district court approximately two months after FMI filed its Chapter XI petition in New York. Camelia and Farnale acknowledge that the Mississippi action was initiated without the permission of the New York bankruptcy court. Under Rule 11-44, the petition filed by FMI in New York acted as a stay to prevent the subsequent Mississippi action. Camelia and Farnale proceeded with the Mississippi action anyway.

Judge Herzog, accordingly, found that Camelia and Farnale had violated the Rule 11-44 stay. He certified the case to Judge Owen pursuant to Rule 920(a)(4). Judge Owen issued the contempt order now on appeal.

With this background, we turn to the arguments advanced by Camelia and Farnale.

II.

Camelia and Farnale claim that a contempt order cannot be premised upon Rule 11-44 on the facts of this case. First, they argue that the meaning of Rule 11-44 is unclear and that, under accepted law, a person cannot be

held in contempt for violating an imprecise order.

Second, they argue that they cannot be held in contempt because they did not know of FMI's Chapter XI petition in New York and, therefore, did not know of the consequent stay. The evidence before Judge Herzog, Camelia and Farnale assert, failed to indicate that they knew of the stay. Proof of such knowledge, they point out, is essential before there can be a finding of contempt.

Third, Camelia and Farnale argue that Judge Owen erred when he accepted as not clearly erroneous Judge Herzog's findings that Camelia and Farnale did know of the New York stay. Judge Owen's review of the facts, they claim, should have been *de novo*.

Finally, Camelia and Farnale argue that they were not bound by the New York stay since they had not received formal notice of it pursuant to Rule 602(a) of the Bankruptcy Rules.

We find these arguments unpersuasive.

It is, of course, true that, for a person to be held in contempt, the court order violated must "be specific and definite." *In Re Rubin*, 378 F.2d 104, 108 (3d Cir. 1967). See, also, *In Re LaMarre*, 494 F.2d 753, 758 (6th Cir. 1974). It is, however, not true, as Camelia and Farnale assert, that Rule 11-44 is imprecise and therefore cannot serve as the basis for a contempt order.

Rule 11-44 bars "the commencement or the continuation of any court or other proceeding against the debtor" after the debtor has filed a Chapter XI petition. It is difficult to conceive of a rule with a more apparent and certain meaning: after the Chapter XI petition has been filed, a debtor cannot be sued. *Cf. In Re Brown*, 454 F.2d 999 (D.C. Cir. 1971).

It is also true, as Camelia and Farnale assert, that a person cannot be held in contempt of an order about which the person had no knowledge. *In Re Rubin, supra; Yates v. United States*, 316 F.2d 718, 723 (10th Cir. 1963). However, the evidence presented to Judge Herzog amply documented knowledge on the part of Camelia, Farnale and their agents of FMI's Chapter XI petition and the consequent stay under Rule 11-44.

The evidence before Judge Herzog indicated the following: (a) that defendant-appellant Goodale, an officer of Farnale, read about FMI's Chapter XI petition in the *Wall Street Journal*, the day after that petition was filed; (b) that defendant-appellant Hubbard, counsel for Camelia and Farnale, read that article also; (c) that, prior to the institution of the Mississippi action, Hubbard had also read about FMI's Chapter XI petition in state court papers filed by FMI and that Hubbard had read Rule 11-44 at that time; (d) that Hubbard confirmed the existence of FMI's Chapter XI petition in a telephone conversation with the clerk of the New York bankruptcy court, that conversation occurring the day before the commencement of the Mississippi action and (e) that the complaint filed by Camelia and Farnale in the Mississippi district court referred to the Chapter XI petition of which Camelia and Farnale now deny any knowledge.

In short, there was ample evidence to support Judge Herzog's finding that Camelia and Farnale, and their agents, knew of FMI's Chapter XI petition and the consequent Rule 11-44 stay.

District Judge Owen accepted those findings as not clearly erroneous. Camelia and Farnale assert this was error because Judge Owen was required to review *de novo* the evidence with respect to Camelia and Farnale's knowledge of the Chapter XI petition. We disagree.

Rule 752(a) of the Bankruptcy Rules provides that all findings of fact made by a court in a bankruptcy context "shall not be set aside unless clearly erroneous." By virtue of Rule 901 and 11 U.S.C. §1(9), the term "court" in Rule

752(a), and thus the clearly erroneous standard, apply to the factual findings of bankruptcy judges, such as the findings certified by Judge Herzog to Judge Owen. Rule 810 also prevents district courts form setting aside findings of fact by bankruptcy judges unless clearly erroneous.

Nevertheless, Camelia and Farnale, relying on *O'Hagan v. Blythe*, 354 F.2d 83 (2d Cir. 1965), argue that the facts certified by Judge Herzog to Judge Owen were to be reviewed by Judge Owen *de novo*, rather than pursuant to the clearly erroneous standard of Rules 752(a) and 810.

O'Hagan was decided eight years before Rules 752(a) and 810 went into effect. Assuming, *arguendo*, that *O'Hagan*, a criminal contempt case, did stand for the position asserted by the creditors, that decision was superseded subsequently at least as to civil contempt proceedings by Rules 752(a) and 810 which, on their face, establish a clearly erroneous standard for review of factual findings by bankruptcy judges. No exception is made in either rule for factual findings with respect to contempt proceedings.

Finally, Camelia and Farnale argue that they were not bound by the stay established by Rule 11-44 since FMI failed to give them formal notice of the Chapter XI petition as required by Rule 602(a).

There is no merit to this position. Rule 602(a) does not apply to debtors-in-possession like FMI. The rule explicitly creates a duty to notify, but only for "trustees" and "receivers." FMI is not its own trustee or receiver.

Moreover, as the *Rubin* decision makes clear, a person is in contempt of court if he knowingly violates a court order, whether or not he received a formal notice. The cases do not require that the contemnors have received formal notice if they have actual knowledge of the order.

Hence, the issue of formal notice is irrelevant to Camelia and Farnale's contempt since it is clear that they, in fact, did know of the stay which they ignored.

In short, there unquestionably was a sound factual basis for Judge Herzog's findings that the creditors knew of FMI's Chapter XI petition and that, in filing the subsequent action in Mississippi anyway, the creditors viloated the "specific and definite" provisions of Rule 11-44. Those findings were not clearly erroneous, and thus, under Rules 810 and 752(a), they must be allowed to stand.

III.

Camelia and Farnale also argue that the bankrutcy court lacked authority and jurisdiction to enter a contempt citation for a violation of Rule 11-44. We disagree.

by virtue of Rule 920(a), the contempt power of the courts in bankruptcy proceedings is limited to punishment for conduct which violates §41(a) of the Bankruptcy Act. Section 41(a) commands obedience to all "order[s], process[es] and writ[s]" of the bankruptcy courts. 11 U.S.C. §69(a).

The essence of Camelia and Farnale's contempt is that they violated Rule 11-44 which forbids the unauthorized commencement of a judicial proceeding against a debtor subsequent to the filing by the debtor of a Chapter XI petition. However, Rule 11-44 is just that: a rule. Section 41(a) does not literally command obedience to "rules," but only to "order[s], process[es] and writ[s]." Hence, Camelia and Farnale claim, the contempt power of Rule 920(a) is unavailable for punishment of the infraction of a mere rule since the language of §41(a) does not encompass rules.

We find this overly-formalistic argument unpersuasive.

The position of Camelia and Farnale is that the courts have no power to enforce the bankruptcy rules via con-

tempt proceedings. That, however, is almost equivalent to saying that the courts cannot enforce the rules at all. To state the position of Camelia and Farnale is to refute it. The bankruptcy rules are to be construed "to secure the expeditious" and "speedy" processing of bankruptcy petitions. Rule 903. Construing the rules so that they cannot be enforced via contempt is obviously inconsistent with that policy.

Rule 11-44 specifically provides that a Chapter XI proceeding "shall operate as a stay of the commencement" of any proceedings against the debtor or with respect to the debtor's property. Since Rule 11-44 has the effect of an order and was designed to expedite automatically the stay that would otherwise be obtained by an order,[2] it would be exalting form over substance to hold that a violation of Rule 11-44 is not punishable under §41(a) and Rule 920 because technically the rule-based stay is not labeled an "order, process or writ."

Indeed, the district courts have found the contempt power of Rule 920(a) quite useful and necessary in enforcing Rules 401 and 601, rules which establish automatic stays in a manner quite similar to Rule 11-44. See, *In Re Tallyn*, Bank. L. Rep. 65,617 (E.D. Va. 1975); *In Re Robert Young*, 1 Collier Bankruptcy Cases 145 (M.D. Fla.1974).

In short, we conclude that the contempt power of the courts under §41(a) and Rule 920 includes the authority to enforce the rules themselves via contempt orders. To hold

2. For a discussion of court orders designed to stay subsequent proceedings against debtors-in-possession, see 1 Collier, *Bankruptcy*, 2.62 (14th ed.1972). For the purposes of our opinion, the important point is that Rule 11-44 now makes the establishment of such stays automatic. In the absence of such automatic stays, the debtors-in-possession secured specific court orders to the same effect. We see no reason to treat a stay explicitly granted by the court differently from a stay established by rule, at least with respect to the courts' enforcement powers via contempt.

otherwise would be to deprive the courts of the authority necessary to ensure that the rules are obeyed.

Camelia and Farnale also argue that the bankruptcy court was without jurisdiction in the proceeding below because of a prior state court action which Camelia and Farnale had instituted against the Jackson condominium developer before FMI filed its Chapter XI petition. Prior to the filing of that petition, Camelia and Farnale brought suit in a Mississippi state court to foreclose their mechanic's and materialmen's liens on the condominium project. That prior state court action, Camelia and Farnale argue, preempted subsequent assumption of jurisdiction by the federal bankruptcy court with respect to the condominium project.

We disagree. Section 311 of the Bankruptcy Act, 11 U.S.C. §711, confides to the bankruptcy court "exclusive jurisdiction of the debtor and its property, wherever located." Statutes which confide exclusive jurisdiction to specialized courts are not to be construed in a manner which impairs that exclusivity. Exclusive jurisdiction means exclusive jurisdiction. *Fritz v. United States*, _____ F.2d _____ (9th Cir., May 19, 1976).

And, indeed, the need for exclusive jurisdiction in bankruptcy proceedings is compelling. Such jurisdiction is necessary "to exclude any interference by the acts of others or by proceedings in other courts where such activities or proceedings tend to hinder the process of reorganization." 6 Collier, *Bankruptcy* 3.03 at 424 (14th ed. 1972).

When FMI filed its Chapter XI petition, the New York bankruptcy court, by virtue of §311, assumed exclusive jurisdiction over all of FMI's property interests. The Jackson condominium project was one such interest and, thus, §311 deprived the Mississippi state court of the jurisdiction which it exercised until then.

It is not without significance that Rule 11-44 stays "the commencement or the *continuation*" of proceedings against the debtor-in-possession. (Emphasis added.) While the bankruptcy rules cannot, of course, expand the jurisdiction of the federal courts, we think it noteworthy that Rule 11-44 stays all actions, both state and federal, in progress when the bankruptcy petition is filed. Such a rule would be useless if those prior, pending actions deprive the bankruptcy courts of jurisdiction over the property involved in them.

In short, §311 prevents the prior state action from depriving the New York bankruptcy court jurisdiction with respect to the Jackson condominium project. Section 311 requires that all matters affecting the debtor-in-possession be centralized in a single tribunal. The requirement of exclusive jurisdiction is clear and, thus, the Mississippi state court proceeding must give way to the mandate of §311 which assured the bankruptcy court of jurisdiction over all property in which FMI had an interest, regardless of any pending state proceeding.

Camelia and Farnale also claim that FMI, as holder of the first deed of trust, did not have a property interest in the condominium project and that, accordingly §311 did not establish jurisdiction in the New York bankruptcy court. A mere mortgage interest, Camelia and Farnale assert, does not constitute "property" within the meaning of the bankruptcy laws. Again, we must disagree.

In bankruptcy contexts, "the term 'property' has been construed most generously and an interest is not outside its reach because it is novel or contingent or because enjoyment must be postponed." *Segal v. Rochelle*, 382 U.S. 375, 379 (1966). Indeed, we think that the *Segal* decision makes if clear that FMI's interest under the deed of trust was a property interest for the purposes of the bankruptcy statutes and therefore conferred jurisdiction over the

Jackson condominium project to the New York bankruptcy court. *Segal*, *supra*, at 379-81.

Camelia and Farnale also argue that their action in the United States District Court in Mississippi would not have affected FMI's reorganization prospects and that, therefore, Rule 11-44 did not bar their Mississippi action. We disagree.

The complaint filed with the Mississippi district court asked for a determination that Camelia and Farnale's liens in the unfinished Jackson condominium project are superior to FMI's interest as holder of the first deed of trust in the project. To put it in the simplest possible terms, Camelia and Farnale want, by virtue of their allegedly superior claims, $76,000 from the liquidated proceeds of the unfinished project which might otherwise be available to FMI by virtue of its deed of trust.

Under these circumstances, it is most inaccurate to say that the Mississippi action can have no effect upon FMI. Indeed, the purpose of the action is to secure $76,000 for Camelia and Farnale which, in the absence of the action, would go to FMI.

Finally, Camelia and Farnale cite *Mid-Jersey National Bank v. Fidelity-Mortgage Investors*, 518 F.2d 640 (3d Cir. 1975), and agrue, on its authority, that the bankruptcy court did not have jurisdiction below and that, therefore, Rule 11-44 was inapplicable. Such reliance on *Mid-Jersey* is misplaced.

In *Mid-Jersey*, a bank which had loaned money to FMI sued FMI when it failed to repay on schedule. Judgment was entered for the bank, and FMI was required to post a $300,000 deposit with the district court, in lieu of a supersedeas bond, in order to appeal judgment.

After the deposit was made and while the appeal was pending, FMI filed its Chapter XI petition. Then, before the Third Circuit, FMI argued that the intervening

Chapter XI petition stayed the appeals court from hearing the case.

The Third Circuit disagreed. Rule 11-44, it reasoned, stays only those proceedings which involve property over which the bankruptcy court has jurisdiction. However, the appeals court held, the $300,000 deposit was "in custodia legis," which is to say, no longer FMI's property, but rather the *res* of a trust held by the district court. Since the deposit was not FMI's property, it was not within the jurisdiction of the bankruptcy court under §311 and, therefore, Rule 11-44 was held inapplicable to the appeal.

Mid-Jersey is distinguishable from the instant appeal in at least one crucial respect: here, unlike the situation in the earlier decision, there is a property interest of FMI's existing at the date of institution of the Chapter XI proceeding which gives the bankruptcy court jurisdiction and which therefore makes Rule 11-44 applicable. As we noted above, the decision of the Supreme Court in *Segal v. Rochelle* indicates that FMI, as holder of a deed of trust, had a property interest in the Jackson condominium project which gave the bankruptcy court jurisdiction under §311.

In short, the fundamental premise of the Third Circuit's decision in *Mid-Jersey* was that the property giving rise to the appeal, then in the form of a district deposit, was no longer the debtor's and therefore was not within the jurisdiction of the bankruptcy court. Here, on the other hand, the interest under the deed of trust in the Jackson project was property of FMI and therefore was within the jurisdiction of the bankruptcy court. Since the basis premise of *Mid-Jersey*—no property of the debtor—is inapplicable here, its conclusion is also.

In summary, we conclude that there was jurisdiction in the bankruptcy court and that the court had the authority

to issue a contempt citation for a violation of Rule 11-44. Moreover, as the *Segal* decision makes clear, FMI's interest under the deed of trust in the Jackson project was a property interest within the exclusive jurisdiction of the New York bankruptcy court. We accordingly reject the argument that the bankruptcy court lacked authority for the action it took below.

IV.

Camelia and Farnale also raise two constitutional issues in their effort to avoid Judge Owen's contempt citation. First, they argue on the authority of *Sniadach v. Family finance Corp.*, 395 U.S. 337 (1969), and its progeny, *Fuentes v. Shevin*, 407 U.S. 67 (1972), *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975), that Rule 11-44 denies creditors due process of law by automatically staying the creditors' rights to commence judicial proceedings, without first giving notice and a hearing to the affected creditors. Since Rule 11-44 becomes operative upon the filing of a Chapter XI petition and since creditors are not given prior notice or hearing to contest that petition, Rule 11-44 denies creditors' rights of judicial relief in violation of due process—so Camelia and Farnale claim.

Camelia and Farnale misconstrue the meaning of due process in the post-*Sniadach* era. *Sniadach* and its progeny do not require that creditors always be given notice and a hearing prior to proceedings which affect their interests. Even in cases involving both property and liberty interests "there are recurring situations in which prior notice and hearing cannot be insisted upon . . . In such cases, the necessary notice and . . . hearing should follow as soon as possible." *Goss v. Lopez*, 419 U.S. 565, 582-83 (1975). The requisites of due process in such cases are met if notice and a hearing are given promptly after

governmental authority has been invoked. *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 611-20 (1974).

The policy considerations underlying Rule 11-44 are considerable. The automatic stay of Rule 11-44 is designed to prevent a chaotic and uncontrolled scramble for the debtor's assets in a variety of uncoordinated proceedings in different courts. The stay insures that the debtor's affairs will be centralized, initially, in a single forum in order to prevent conflicting judgments from different courts and in order to harmonize all of the creditors' interests with one another.

Moreover, the rule itself provides a procedure for lifting the automatic stay. Rule 11-44(d) specifically mandates that motions to modify or lift stays established by Chapter XI petitions shall be heard on "the earliest possible date." There is even a provision which allows the bankruptcy judge to lift the Rule 11-44 stay without notice to the debtor-in-possession if quick action is necessary to prevent "immediate and irreparable injury, loss or damage" to the creditors. Rule 11-44(e).

Rule 11-44 provides for an immediate hearing and relief from any hardship that an automatic stay might cause. In short, there is no constitutional infirmity in Rule 11-44 since that rule itself gives the creditors an immediate opportunity to have the stay lifted or modified and since the policy considerations requiring such initial stays are not insignificant.

For their second constitutional claim, Camelia and Farnale argue that the fact-finding methods used by Judges Herzog and Owen violated standards of due process.

Judge Herzog conducted a show cause hearing on FMI's complaint and then certified his findings to Judge Owen who conducted a second show cause proceeding. Camelia and Farnale now argue that one or the other judge should

have conducted a proceeding, but not both. Since both the district and the bankruptcy judges conducted their own separate hearings, Camelia and Farnale assert, a violation of due process occurred.

When stripped to its essentials, Camelia and Farnale's claim is that due process is violated when a contemnor is given too many opportunities to present his side of the case. This is a rather novel theory of due process.

It is perhaps true, as Camelia and Farnale assert, that Judge Herzog could have certified this matter to Judge Owen without first conducting a show cause hearing in the bankruptcy court. It may also be true, as Camelia and Farnale assert, that in light of Judge Herzog's prior hearing, it was unnecessary to hold a second adversary proceeding in the district court.[3]

Nevertheless, we fail to understand why an extra hearing, even if not contemplated by the bankruptcy rules, should violate due process. Indeed, it is a unique theory of constitutional law to argue, as do Camelia and Farnale, that they were denied due process since they had too many opportunities to present their side of the controversy. This is a theory of due process which we decline to accept.

In short, we can see nothing unconstitutional in Rules 11-44 and 920 on their face or as applied here. Rule 11-44 itself provides creditors an immediate opportunity to challenge the automatic stay as it affects them. The procedures utilized below to implement the courts' power under Rule 920 gave Camelia and Farnale all the process which was due to them. In the absence of any constitutional errors, we therefore decline to overturn the contempt citation of the court below.

3. We, of course, express no opinion as to the correctness of these assertions. We merely accept them *arguendo* for our analysis of the asserted due process claim advanced by Camelia and Farnale.

V.

Camelia and Farnale also argue that, notwithstanding the language of Rule 11-44, they were authorized to commence their action in the United States District Court for the Southern District of Mississippi by virtue of 28 U.S.C. §959. That provision authorizes lawsuits against debtors-in-possession "with respect to any of their acts or transactions in carrying on business." Thus, Camelia and Farnale claim, §959 authorized their action against FMI.

We disagree. When viewed in the context of the statutory framework for Chapter XI reorganizations, it is clear that §959 does not permit the type of action which Camelia and Farnale instituted in Mississippi against FMI.

The evident purpose of §959 is to enable a debtor-in-possession to continue his business subsequent to the filing of a Chapter XI petition. If debtors-in-possession were immunized from all suits after filing Chapter XI petitions, it would be difficult, if not impossible, for them to remain in business. Suppliers would be less likely to provide merchandise, banks would be less likely to extend credit and workers would be less likely to undertake employment with a debtor-in-possession if they were foreclosed from suing the debtor for wages or other obligations incurred after the Chapter XI petition is filed.

Hence, §959 makes debtors-in-possession suable for the routine occurrences which arrise from efforts to continue "carrying on business" after the Chapter XI petition is filed.

However, §959 was not intended to serve as *carte blanche* for creditors seeking to sue debtors-in-possession in a forum of the creditors' choosing. As has been emphasized throughout our discussion, the policy of the bankruptcy statutes has been to centralize, at least initially, all creditor suits in a single forum so as to prevent a chaotic

scramble for the debtor's assets, a scramble which could very well lead to conflicting decisions from different courts.

Hence, a suit against FMI which stems from FMI's efforts to conduct routine business is permitted under §959. A suit to enhance a creditor's position in the reorganization of the bankrupt is not so authorized.

We conclude, on the facts of this case, that Camelia and Farnale's suit in Mississippi was of the latter sort, an action arising out of FMI's bankruptcy based on pre-bankruptcy operations rather than FMI's efforts to continue operations. As this court recognized in *Austrian v. Williams*, 216 F.2d 278, 285 (2d Cir. 1954), the "attempt to collect and liquidate assets of a debtor is not to carry on its business in any proper sense of the term." Nevertheless, that is precisely what we have here, an attempt by Camelia and Farnale to secure their position against FMI's assets as a result of FMI's bankruptcy.

The line between suits stemming from the continuing conduct of business and those actions not permitted by §959 is, perhaps, in certain instances less apparent than one might like. Nevertheless, on the facts of this case, it is clear that Camelia and Farnale's action arose from FMI's bankruptcy, rather than FMI's continuing conduct of business, and that accordingly, the action was one not authorized by §959.

VI.

Camelia and Farnale claim that, under Mississippi law, their liens on the unfinished condominium project establish rights superior to FMI's interest stemming from the deed of trust in that same project. Prior to the filing of its Chapter XI petition, FMI had initiated procedures to foreclose on the condominium project and use the assets derived from foreclosure to satisfy the construction loan

advanced by FMI. The federal action initiated by Camelia and Farnale, they assert, was a justifiable effort to prevent FMI from improperly appropriating the unfinished condominium project for the satisfaction of FMI's allegedly inferior claim.

It may be true, as Camelia and Farnale assert, that, by virtue of their allegedly superior claim under Mississippi law, they are entitled to protection against the consequences of FMI's attempted foreclosure on the condominium project. That, however, is not the issue in this case, as it presently atands before us. The issue here is whether, at the time Camelia and Farnale filed their federal action, the Mississippi district court was the proper forum for them to advance these arguments.

We conclude that it was not.

Camelia and Farnale were aware of FMI's Chapter XI petition in New York almost immediately after it was filed. At that point, Rule 11-44 required Camelia and Farnale to secure the permission of the New York bankruptcy court before filing a separate action in Mississippi. As noted above, the need to centralize bankruptcy-related proceedings and to prevent a chaotic scramble for the debtor's assets is an interest of paramount importance in the bankruptcy laws.

Camelia and Farnale, rather than addressing their state law claims to the New York bankruptcy court, proceeded to file an action in Mississippi. It is this willful violation of the procedures established by the bankruptcy rules which is at issue here.

In short, the validity of Camelia and Farnale's substantive claim under Mississippi law is not relevant to Judge Owen's contempt citation or this appeal. The issue here is a procedural one: whether Camelia and Farnale should have secured permission from the New York bankruptcy court before proceeding with their action in

Mississippi.

Rule 11-44 required Camelia and Farnale to secure such prior permission. They deliberately did not and, hence, were in contempt of the New York bankruptcy court. That Camelia and Farnale may have a valid substantive position under Mississippi law does not Mitigate, excuse or justify their willful procedural violation of the federal bankruptcy rules.

VII.

Finally,[4] Camelia and Farnale argue that Attorney Hubbard, counsel to Camelia and one of the contemnors who appeals to this court, cannot be held in contempt by virtue of his status as an attorney. This conclusion, Camelia and Farnale assert, is mandated by *Maness v. Meyers*, 419 U.S. 449 (1975).

We disagree. Indeed, the *Maness* decision specifically affirmed that lawyers can be cited for contempt for advising clients to disregard court orders. *Maness, supra* at 459-60. The *Maness* decision does carve out an exception to this rule in certain cases raising fifth amendment issues. However, there are no such fifth amendment interests involved in this case and, thus, Attorney Hubbard has no basis for resisting the contempt citation on the authority of *Maness*.

VIII.

In conclusion, Camelia and Farnale provide no basis—jurisdictionally, substantively, procedurally, or constitutionally—for us to reverse the decision and order of the district court. Rule 11-44 clearly required Camelia and Farnale to secure the permission of the New York bank-

4. Camelia and Farnale raise two other arguments with respect to alleged conflicts of interest on the part of FMI's attorneys and with respect to an alleged variance between FMI's complaint in the bankruptcy court and the judgment issued by the district court. We find these arguments to be of such little merit that it is unnecessary to discuss them here.

ruptcy court before filing an action against FMI in Mississippi. Camelia and Farnale did not secure such permission and, therefore, must be prepared to confront the consequences.

We accordingly affirm the order of the district court in all respects. Of course, our decision does not preclude Camelia and Farnale from raising their substantive claims, again, in a proper forum in accordance with proper procedures.

VAN GRAAFEILAND, *Circuit Judge*, dissenting:

Although the War between the States terminated more than a century ago, it might be difficult to convince appellants of this fact. Residents of Texas, they have been fined $20,000 for alleged violation of a rule governing the practice and procedure of a bankruptcy court in New York City in a proceeding in which they were not even parties. I cannot join my brothers in their approval of what has taken place.

Appellants, Camelia Builders, Inc. and Farnale, Inc., were mechanics lienors of a construction project in Jackson, Mississippi; and, if they wished to have the benefit of their liens, were required to commence suit to foreclose within twelve months after their debt came due. Miss. Code of 1972 § 85-7-141. They did commence suit in Rankin County Court of Mississippi in January, 1975.

Fidelity Mortgage Investors (FMI) was the interim lender on the project, and its indebtedness was secured by a deed of trust. Shortly after the institution of appellants' sute in Mississippi, FMI commenced a Chapter XI proceeding in New York City and thereafter filed a plea of abatement in the Mississippi action based on this proceeding. It then had one of its attorneys substituted as trustee under the deed of trust, and the attorney commenced the publication required in Mississippi for non-judicial sale of his trust estate.

Appellant Hubbard, attorney for the mechanics lienors, thus found himself faced with the prospect of an immediate non-judicial sale and possible loss of his clients' liens. He decided that his clients' interests could best be protected by commencing an action in the United States District Court for the Southern District of Mississippi seeking to prevent the trustee's sale, or, alternatively, that it be conducted by chancery proceeding and that FMI be directed to pay over from the proceeds of the sale the sum of $75,964.33, the amount of his clients' liens.[1] District Judge Nixon wisely permitted the foreclosure sale to continue but directed the deposit of the $75,964.33 with his court until a determination could be made as to whether these proceeds were the property of FMI or were subject to the prior lien of appellants. It is for there temerity in bringing this action that appellants, including attorney Hubbard, have been held jointly and severally liable for over $20,000.

Section 41(a) of the Bankruptcy Act, 11 U.S.C. § 69(a), provides in part that in proceedings before a refreree, a person shall not disobey "any lawful order, process, or writ". Bankruptcy Rule 920 provides that conduct prohibited by § 41(a) may be punished by the referee. The prohibited conduct in the instant case is the alleged violation of Rule 11-44 of the Chapter XI rules, which provides in part that a Chapter XI petition shall operate as a stay of the commencement or continuance of any proceeding against the debtor or to enforce any lien

1. For some unknown reason, appellants named FMI as a party defendant, rather than the trustee who was planning to conduct the sale. However, it is clear that appellants were not seeking any affirmative relief against FMI but were attempting only to protect their interest as lienors of the Jackson, Mississippi construction project.

against his property.[2]

28 U.S.C. § 2075 empowers the Supreme Court to prescribe by general rules the "practice and procedure unter the Bankruptcy Act". It provides further that such rules "shall not abridge, enlarge or modify any sub stantive right". The authority granted the Supreme Court by § 2075 is restricted in its operation to matters of pleading and court practice and procedure. *Sibbach v. Wilson & co.*, 312 U.S. 1,10 (1941). Bankruptcy rules enacted thereunder may not add to, subtract from or vary the provisions of the bankruptcy law and cannot extend the jurisdiction of a referee beyond that which is conferred upon him by statute. *Meek, v Centre County Banking Co.*, 268 U.S. 426,434 (1925); *In re State Thread Co.*, 126 F.ed 296, 300 (6th Cir. 1942).

The jurisdiction of a bankruptcy court is basically in rem, and possession of the res is a prerequisite to the court's summary exercise of its power. *Callaway v. Benton*, 336 U.S. 132,142 (1949); *Harrison v. Chamberlin*, 271 U.S. 191 (1926); *In re Dolly Madison Industries, Inc.*, 504 F.2d 499, 503 (3d Cir. 1974); *Texas & N.O.R.R. v. Phillips*, 211 F 2d 419, 421 (5th Cir. 1954) cert. denied 348 U.S. 913 (1955). Congress did not give bankruptcy courts jurisdiction over all controversies that in some way affect the debtor's estate, *In re Beck Industries, Inc.*, 479 F.2d 410,415 (2d Cir.) cert. denied 414 U.S. 858 (1973); *In re Unishops, Inc.*, 494 F.2d 689, 690 (2d Cir. 1974); and the mere financial interest of a bankrupt's estate in the outcome of litigation pending in state court does not

2. Ruie 920 (a) (3) provides that a referee shall not order imprisonment nor impose a fine of more than $250 as punishment for contempt. If he believesthat more substantial punishment is warranted, he may certify the facts to a district judge who "shall proceed as for a contempt not committed in his presence". Rule 920 (a) (4). In the instant case, the referee found appellants guilty of contempt and then certified the facts to the District Court which made an additional finding based upon the certified facts.

authorize the issuance of an injunction against its prosecution. *In re Adolph Gobel, Inc.*, 80 F.2d 849,852 (2d Cir. 1936).

In *In re Stanndco Developers, Inc.*, _____ F.2d _____ (2d Cir. April 26, 1976), slip op. 3443, we held squarely that a bankruptcy court has no jurisdiction to restrain state court proceedings seeking to enforce liens on property not belonging to the debtor. This holding is in accord with similar decisions in other circuits which hold that mortgaged premises are not the "property" of the bankrupt mortgagee within the meaning of the Bankruptcy Act. See, e.g. *Brunn v. Wichser*, 75 F.2d 25, 28 (3d Cir. 1934); *In re Holiday Lodge, Inc.*, 300 F.2d 516, 519 (7th Cir.) cert. denied 371 U.S. 824 (1962); *In re A. Roth Co., Inc.*, 125 F.2d 396, 398 (7th Cir. 1942). I am unable to reconcile the holding of the majority herein with *Stanndco* and the cases above cited. In my opinion, FMI's interest as beneficiary of a deed of trust did not confer jurisdiction over the Jackson construction project in the New York bankruptcy court.

Some states, such as Mississippi, use a deed of trust to perform the functions of a mortgage. 4A Powell on Real Property §574. A deed of trust is conveyed to one other than the lender who holds it in trust for both the lender and the borrower. 9 Thompson on Real Property §4660. Under Mississippi law, the lender, as beneficiary of the deed of trust, has no estate in the land, but only an interest therein to the extent that he can cause the trustee to sell the land and apply the proceeds to the payment of the secured debt. *Baker v. Conn. General Life Ins. Co.*, 196 Miss. 701 (1944). There is nothing in the Mississippi mortgaging procedure which justifies a holding that mortgaged premises are the "property" of the mortgagee. In my opinion, the summary jurisdiction of a bankruptcy

referee would be extended far beyond the intent of Congress if an action by one lienor to enforce his lien could be stayed by a bankruptcy rule of practice and procedure simply because another lienor had filed for a Cahpter XI arrangement.[3]

No court has the power to punish for the violation of an order issued without jurisdiction over the subject matter or the parties. *Brougham v. Oceanic Steam Navigation Co.*, 205 F. 857, 860 (2d Cir. 1913). Likewise, a court without jurisdiction over the person of an alleged contemnor cannot punish him for the alleged violation of one of its rules. *DeParcq v. United States District Court*, 235 F.2d. 692 (8th Cir. 1956). If, as I believe, the referee in bankruptcy had no jurisdiction over the construction project in Jackson, Mississippi, neither he nor the District Court was empowered to hold appellants in contempt for attempting to protect their lien rights in that property.

Assuming, however, that the bankruptcy referee did have jurisdiction over the persons of appellants, he did not have the power to institute Rule 920 proceedings against them for violation of Rule 11-44. Prior to the promulgation of the bankruptcy rules, a referee had no power to punish for contempt. *O'Hagan v. Blythe*, 354 F.2d 83, 84 (2d Cir. 1965). Bankruptcy Rule 920 now authorizes a referee, in proceedings before him, to punish for disobedience of "any lawful order, process, or writ" or to ceritfy the facts to the District Court for such punishment. I disagree with my brothers when they hold a bankruptcy rule of practice and procedure to be a "lawful order"

3. If, as the majority seems to hold, premises subject to a lien are the "property" of the lienor, interesting legal problems are presented. There may be three or four mortgages and 50 to 100 mechanic's liens on file against a building project. As these lienors take turns in filing for bankruptcy or for bankruptcy Chapter proceedings in various parts of the United States, resolution of the jurisdictional maze which results will be a formidable task.

within the meaning of this rule. Many years ago, this Court committed itself to the proposition that statutory contempt proceedings should be reviewed in a highly technical manner, stating that "where Congress has been so industrious to restrict the natural inherent powers of a federal court, scrupulous attention to the limitations it has imposed would seem to be the proper course." *In re Probst*, 205 F. 512, 513 (2d Cir. 1913). The contempt powers of a federal court are specifically limited by statute, *Berry v. Midtown Service Corp.*, 104 F.2d 107, 109 (2d Cir.) cert. granted, 308 U.S. 536, appeal dismissed per stipulation. 308 U.S. 629 (1939); and such powers should not be extended beyond the plain terms of the statute which grants them. *Denver-Greeley Valley Water Users' Ass'n v. McNeil*, 131 F.2d 67, 70 (10th Cir. 1942)[4]

18 U.S.C. §401 empowers a court of the United States to punish for disobedience of its "lawful writ, process, order, *rule*, decree, or command." (Emphasis supplied) In contrast, in proceedings before a referee, punishment for contempt is limited to violations of a "lawful order, process, or writ." 11 U.S.C. §69. The omission of the word "rule" could not have been inadvertent. The phrase "lawful order" is also used in §14(c)(6) of the Bankruptcy Act (11 U.S.C. §(c)(6) wherein it is provided that the bankruptcy court shall grant a discharge unless satisfied that the bankrupt "has refused to obey any lawful order of, or to answer any material question approved by the court." Sections 14 ans 49 of the Bankruptcy Act are read

4. With all due respect to my brothers, I do not think that it is "overly-formalistic" to require a federal court to comply with the strict language of a contempt statute. Neither do I believe that such requirement exalts "form over substance". A man such as appellant Hubbard must work long and hard to accumulate $20,000. Before we permit a court to take this from him, using the "legal thumbscrew" of contempt, we should be sure that it has kept strictly within the limitations of the statute which empowers it to act. This is not exalting form over substance. It is simple justice.

together so that, upon the failure of a petitioner to obey an order of the referee, the referee has the alternative of either denying discharge or holding petitioner in contempt. *In re Kokoszka*, 479 F.2d 990, 997 (2d. Cir. 1973), aff'd 417 U.S. 642 (1974).

In cases decided under §14, the courts have concerned themselves with the violation of orders, not of rules. We have required, not only that the order violated be an express court order, *Berry v. Midtown Service Corp.*, *supra*, 104 F.2d at 110, but also that it be a "lawful" one. *In re Teperman*, 123 F.2d 732 (2d Cir. 1941). I see nothing in 28 U.S.C. §2075 of the orders of the Supreme Court issued pursuant thereto to indicate that the phrase "lawful order" is hereafter to be so broadly construed as to include within its meaning all of the newly enacted bankruptcy rules.[5]

When these rules were approved by the Supreme Court, Mr. Justice Douglas express strong disagreement with Rule 920, quoting the statement of Chief Justice Taft in *Cooke v. United States*, 267 U.S. 517, 539 (1925) that the exercise of contempt power is "a delicate one and care is needed to avoid arbitrary or opressive conclusions." Had Justice Douglas known that Rule 920 would be construed to empower a referee to punish anyone even remotely affected by the broad sweep of a bankruptcy court's jurisdiction for violation of one of the many, little known

5. I do not share my brothers' concern about the enforcibility of rules of practice and procedure which are not self-executing c. *Bardin v. Mondon*, 298 F.2d 235, 238 (2d Cir. 1961). More importantly, since Congress did not provide that in proceedings before a referee punishment could be imposed for the violation of a rule, it, too, felt that a referee's "lawful orders" could enforce such compliance as was required. It is interesting to note that Official Form 11-F13 covering notice to creditors in a Chapter XI proceeding is now in the form of an order and incorporates the language of Rule 11-44. This indicates to me that something more is required to call forth the punitive sanctions of contempt than the mere enactment of the rule.

rules of bankruptcy procedure, I am sure his disagreement would have been expressed in even stronger terms.

Appellants have absconded with no money belonging to the debtor in arrangement; it is safely under the control of the United States District Court in Mississippi awaiting a determination as to whether it is the property of FMI to prove its right to these funds in a plenary proceeding in the Mississippi District Court. I believe, on the other hand, that appellants have been dealt with most unjustly by being held in contempt of a New York bankruptcy referee's "lawful order" and required to pay $20,000 from their own pockets because of such "contempt".

For the reasons above set forth, I respectfully dissent.

APPENDIX II

United States Court of Appeals
Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fifth day of November, one thousand nine hundred and seventy-six.

Present: Hon. J. Joseph Smith,
Hon. Walter R. Mansfield,
Hon. Ellsworth A. Van Graafeiland,
Circuit Judges.

In re:

Fidelity Mortgage Investors,
Debtor,

Fidelity Mortgage Investors,
Applicant-Appellee,

versus No. 76-5007

Camelia Builders, Inc., E. J. Yelverton, Jr., Farnale, Inc., R. L. Goodale and Jeffrey H. Hubbard,
Respondents-Appellants.

A petition for a rehearing having been filed herein by counsel for the appellants,

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

/s/ A. DANIEL FUSARO
A. DANIEL FUSARO
Clerk

United States Court of Appeals
Second Circuit

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fifth day of November, one thousand nine hundred and seventy-six.

In re:

Fidelity Mortgage Investors,
Debtor,

Fidelity Mortgage Investors,
Applicant-Appellee,

versus 76-5007

Camelia Builders, Inc., E. J. Yelverton, Farnale, Inc., R. L. Goodale and Jeffrey H. Hubbard,
Respondents-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellants, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ IRVING R. KAUFMAN,
Chief Judge

APPENDIX III

United States District Court
Southern District of New York

In re

Fidelity Mortgage Investors,

Debtor,

Fidelity Mortgage Investors,

Applicant,

against

Bankruptcy
No. 75 B 154

Camelia Builders, Inc., E. J. Yelverton, Jr., Farnale, Inc., R. L. Goodale and Jeffrey H. Hubbard,

Respondents.

ORDER UNDER BANKRUPTCY RULE 920(a)(4) ADJUDGING RESPONDENTS GUILTY OF CIVIL CONTEMPT

Fidelity Mortgage Investors ("FMI"), debtor-in-possession, having applied to the bankruptcy court on March 27, 1975, for a certificate of facts and an order under Rule 920 of the Rules of Bankruptcy Procedure, and a hearing having been held on August 19, 1975, after due notice, on the order of the Honorable Asa S. Herzog, Bankruptcy Judge, requiring Camelia Builders, Inc., E. J. Yelverton, Jr., Farnale, Inc., R. L. Goodale and Jeffrey H. Hubbard (the "Respondents") to show cause before this court why they should not be adjudged in civil contempt by reason of the facts set forth in the certificate July 29, 1975, and after hearing Weil, Gotshal & Manges, attorneys for FMI, by Richard P. Krasnow and Philip H. Kalban, of counsel, in support of the application, and Jeffrey H. Hubbard, as attorney for Respondents, in opposition thereto, and it appearing from the Certificate of Facts that Respondents willfully and intentionally violated the automatic stay provisions of Rule 11-44 of the Rules of Bankruptcy Procedure, and upon the affidavits, previously submitted, of George C. Black, Jr., sworn to on August 8, 1975, setting forth FMI's actual and necessary costs and expenses incurred in connection with the contempt proceedings herein, a copy of which affidavit is annexed hereto as Exhibit "A," and of James Leon Young, a member of the firm of Young, Young & Scanlon of Jackson, Mississippi, special counsel to FMI, sworn to August 12, 1975, certifying the actual and necessary fees, costs and expenses incurred by said firm as a result of the conduct of the Respondents and the contempt proceedings herein, a copy of which affidavit is annexed hereto as Exhibit "B," and upon the affidavit of Michael L. Cook, a member of the firm of Weil, Gotshal & Manges, attorneys for FMI, sworn to January 5, 1976, setting forth the actual and necessary fees, costs and expenses incurred by said firm in connection with the contempt proceedings herein, which affidavit is annexed hereto as Exhibit "C," it is

ORDERED, ADJUDGED AND DECREED that Respondents are in civil contempt of court by reason of their commencement of the action entitled *Camelia Builders, Inc. et al.* v. *Fidelity Mortgage Investors,* currently pending before the United States District Court for the Southern District of Mississippi, Jackson Division [Civil Action No. J75-69(N)] (the "Mississippi Action"), in violation of the automatic stay provisions of Rule 11-44 of the Rules of Bankruptcy Procedure; and it is further

ORDERED that Respondents be, and they hereby are, directed to take forthwith any and all actions necessary to effectuate the return to FMI, as debtor-in-possession, of the $75,964.33 deposited by FMI in the Mississippi Action; and it is further

ORDERED that Respondents be, and they hereby are, jointly and severally directed to pay to the entities designated below the costs, including attorneys' fees, incurred by FMI in connection with the Mississippi Action and the contempt proceedings herein, as hereinafter set forth:

FMI P. O. Box 52597 Jacksonville, Florida 32201		$ 283.05
Young, Young & Scanlon Special Counsel to FMI 930 Deposit Guarantee National Bank Building Jackson, Mississippi 39201	Fees Disbursements	$ 4,022.50 $ 649.70
Weil, Gotshal & Manges Attorneys for FMI 767 Fifth Avenue New York, New York 10022	Fees Disbursements	$15,075.00 $ 671.19

Dated: New York, New York
January 15, 1976.

/s/ RICHARD OWEN
U.S.D.J.

MEMORANDUM AND ORDER

United States District Court
Southern District of New York

In re:

Fidelity Mortgage Investors,
Debtor,

Fidelity Mortgage Investors,
Applicant,

against
Bankruptcy
No. 75 B 154

Camelia Builders, Inc., E. J. Yelverton, Jr., Farnale, Inc., R. L. Goodale, Jeffrey H. Hubbard and Thomas W. Crockett, Jr.,
Respondents.

OWEN, District Judge

This contempt proceeding is before me on certification from the referee pursuant to Rule 920(a)(4) of the Bankruptcy Rules of Procedure.[1] Bankruptcy Judge Herzog, in his certification decision of July 14, 1975, found as follows: respondents, after having actual notice of Fidelity Mutual Investor's [hereinafter FMI] Chapter XI filing, brought suit against FMI in Federal District Court for the

1 Rule 920(a)(4) reads as follows:
Certificate to District Judge. If it appears to a referee that conduct prohibited by § 41a of the Act may warrant punishment by imprisonment or by a fine of more than $250, he may certify the facts to the district judge. On such certification the judge shall proceed as for a contempt not committed in his presence.

Southern District of Mississippi[2] in violation of the automatic stay provisions of Rule 11-44 of the Rules of Bankruptcy Procedure.[3]

After oral argument on August 19, 1975 and a complete examination of the record, I find that respondents are in civil contempt.

Under Bankruptcy Rule 810, I am obliged to "accept the referee's findings of fact unless they are clearly erroneous, and . . . give due regard to the opportunity of the referee to judge of the credibility of the witnesses." Respondents claim that under *O'Hagan v. Blythe*, 354 F.2d 83 (2d Cir. 1965), the clearly erroneous standard does not apply to a contempt certification. However, the reasoning in *O'Hagan* is based on the referee's inability to cite for contempt prior to 1973. However, under the new Bankruptcy Rules, a referee has the power to summarily punish for contempt (R. 920), and the District Court reviews his certification of facts as an appellate court.

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2 This action [hereinafter the Mississippi action] sought an order: 1) enjoining FMI from proceeding with the non-judicial sale; 2) declaring the contractors' alleged mechanic's and materialmen's lien for services purportedly rendered prior to institution of this Chapter XI case in the amount of $75,964.33 to be superior to the lien of FMI, and, if the foreclosure sale were not enjoined, 3) requiring FMI to turn over to the contractors the proceeds of the sale to the extent of $75,964.33. The Mississippi district court allowed the sale to proceed, but required FMI to put the $75,964.33 in escrow until resolution of the action.

3 Rule 11-44 — Petition as Automatic Stay of Actions Against Debtor and Lien Enforcement reads, in pertinent part, as follows:

> A petition filed under Rule 11-6 or 11-7 shall operate as a stay of the commencement or the continuation of any court or other proceeding against the debtor . . . .

R. 810 being applicable, I hold that the referee's findings of fact are not clearly erroneous. While the record is not unequivocal that respondent Hubbard knew with certainty that FMI was in bankruptcy the day *before* he had the Mississippi action filed, by his own testimony at the hearing before Bankruptcy Judge Herzog, he knew on March 24, 1975, the day the suit was filed. If the suit had been filed before Mr. Hubbard had received final confirmation from the Southern District of New York Clerk, he should have ordered the suit discontinued. Respondents were well aware of the automatic stay provision of R. 11-44. If the Mississippi action was as essential to the preservation of their rights as they claim, relief was available under R. 11-44(e), which provides for *ex parte* relief from the automatic stay.

Instead, respondents chose to rely on 28 U.S.C. §959(a)[4] as an exception to R. 11-44. Their reliance is misplaced. As Judge Herzog reasoned in his certification decision, the non-judicial foreclosure sale by FMI of property in which both FMI and Respondents Camelia Builders, Inc. and Farnale, Inc., a joint-venture, claimed liens, did not constitute a "carrying on of business" as required by 28 U.S.C. §959(a). Respondents' alleged good faith reliance on § 959 will not prevent them from being found in contempt.

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4 28 U.S.C. § 959(a) reads as follows:

> Trustees, receivers, or managers of any property, including debtors in possession, may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property. Such actions shall be subject to the general equity power of such court so far as the same may be necessary to the ends of justice, but this shall not deprive a litigant of his right to trial by jury.

> It is equally apparent that the deliberate disobedience by respondents . . . is not mitigated by their subjective legal conclusions. Unlike its criminal counterpart, civil contempt is " 'wholly remedial,' serves only the purpose of a party litigant and is intended to coerce compliance with an order of the court or to compensate for losses or damages caused by non-compliance." [citations omitted]. [T]he good faith underlying the respondents' determination to sue in the [State] court does not diminish their culpability. *In re American Associated Systems, Inc.*, 373 F. Supp. 977, 979 (E.D. Ky. 1974).

Respondent Hubbard, as attorney for himself and the other respondents, is equally in contempt with the clients he counseled. Mr. Hubbard was aware of the automatic stay provision of Rule 11-44 and yet he chose to proceed, hoping that 28 U.S.C. § 969 would apply. Bankruptcy Judge Herzog found as follows:

> I think he played fast and loose with the Rules by, in his own language, 'hedging his bet.' It only indicates to me a contemptuous attitude to Rules which have the sanction of the Supreme Court and of the Congress of the United States. I don't think there is room for hedging.
>
> * * * *
>
> This court is loathe to certify an attorney for contempt but if an attorney will not recognize and honor the obligation to obey the automatic stay provisions of the Rules, how could a layman be expected to do so.

I therefore conclude that respondents are guilty of contempt of court and grant applicant FMI's request for costs, including attorneys' fees incurred by FMI in connection with the Mississippi action and prosecuting this contempt proceeding. Respondents are also required to cause the monies which were deposited by the debtor-in-possession in the Mississippi action to be returned to FMI.

Submit order on notice.

/s/ RICHARD OWEN
United States District Judge

December 16, 1975

APPENDIX IV

ORDER TO SHOW CAUSE WHY RESPONDENTS SHOULD NOT BE ADJUDGED GUILTY OF CIVIL CONTEMPT

(Number and Title Omitted)

Fidelity Mortgage Investors ("FMI"), debtor-in-possession, having applied on March 27, 1975, for a certificate of facts and an order under Rule 920 of the Rules of Bankruptcy Procedure, and a hearing having been held on the 10th and 11th days of April, 1975, after due notice to Camelia Builders, Inc. ("Camelia"), E. J. Yelverton, Jr. ("Yelverton"), Farnale, Inc. ("Farnale"), R. L. Goodale

("Goodale"), Jeffrey H. Hubbard ("Hubbard") and Thomas W. Crockett, Jr. ("Crockett"), the above-named respondents, and after hearing Weil, Gotshal & Manges and Charles Seligson, attorneys for FMI, by Richard P. Krasnow and Michael Z. Brownstein, of counsel, in support of the application, and Jeffrey H. Hubbard, *pro se* and as attorney for Camelia, Yelverton, Farnale and Goodale in opposition thereto, and FMI having withdrawn its application as against Crockett, and upon all of the evidence adduced at said hearing, and upon the decision of this court dated July 14, 1975 and the Bankruptcy Judge's certificate of facts under Rule 920 of the Rules of Bankruptcy Procedure, dated July 29, 1975, annexed hereto; it is

ORDERED that Camelia, Yelverton, Farnale, Goodale and Hubbard, the above-named respondents be, and they hereby are, required to appear before a United States District Judge for the Southern District of New York, in Room 506, United States Courthouse, Foley Square, New York, New York on the 19th day of August, 1975 at 10 o'clock in the forenoon of that day, to show cause why they should not be adjudged in contempt by reason of the facts certified in the said certificate, and why they should not be taxed with all costs incurred or to be incurred by FMI in connection with the proceedings commenced by the respondents entitled *Camelia Builders, et al.* v. *Fidelity Mortgage Investors,* presently pending before the United States District Court for the Southern District of Mississippi, Jackson Division [Civil Action No. J75-69(N)] and the proceedings herein, inclusive of reasonable counsel fees; and it is further

ORDERED that service of this order shall be deemed sufficient if a copy thereof and of the certificate dated

July 29, 1975, be served upon Jeffrey H. Hubbard, *pro se* and as attorney for Camelia, Yelverton, Farnale and Goodale, on or before the 30 day of July, 1975.

Dated: New York, New York
July 29, 1975

/s/ ASA S. HERZOG
Bankruptcy Judge

CERTIFICATE OF FACTS SHOWING CONTEMPT

(Number and Title Omitted)

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK:

I, Asa S. Herzog, Bankruptcy Judge in the above-entitled case, upon the application of Fidelity Mortgage Investors ("FMI"), the above-named debtor, for a Bankruptcy Judge's certificate under Rule 920 of the Rules of Bankruptcy Procedure, after hearings having been held on the 10th and 11th days of April, 1975, after due notice to Camelia Builders, Inc. ("Camelia"), E. J. Yelverton, Jr. ("Yelverton"), Farnale, Inc. ("Farnale"), R. L. Goodale ("Goodale"), Jeffrey H. Hubbard ("Hubbard") and Thomas W. Crockett, Jr. ("Crockett"), the above-named respondents, and upon the opposition to said motion by

said respondents, and FMI having withdrawn its application in respect to Crockett, make the following findings of fact and hereby certify such facts:

1. Heretofore and on January 30, 1975, FMI filed with this court a petition for an arrangement under Chapter XI of the Bankruptcy Act, and on January 31, 1975, FMI was authorized to continue operating its business as debtor-in-possession.

2. FMI is a Massachusetts business trust and has qualified in the past as a real estate investment trust. Immediately prior to the commencement of the Chapter XI case herein, it was engaged in the business of making short-term construction and development loans, generally secured by first mortgages on the subject property, and owning and operating real estate.

3. Upon the filing by FMI of its Chapter XI petition, the automatic stay provision contained in Rule 11-44 of the Rules of Bankruptcy Procedure became applicable and stayed, *inter alia,* the commencement or the continuation of any court or other proceeding against the debtor. Rule 11-44 provides, in part, as follows:

> (a) *Stay of Actions and Lien Enforcement.* A petition filed under Rule 11-6 or 11-7 shall operate as a stay of the commencement or the continuation of any court or other proceeding against the debtor, or the enforcement of any judgment against him, or of any act or the commencement or continuation of any court proceeding to enforce any lien against this property, or of any court proceeding, except a case pending

> under Chapter X of the Act, for the purpose of the rehabilitation of the debtor or the liquidation of his estate.

4. On or about March 29, 1972, FMI had entered into a construction loan agreement with Camelia Bay Corporation (the "Borrower") for the purpose of loaning monies to the Borrower so as to enable it to construct an 80-unit condominium project in Jackson Mississippi. As security for the loan, FMI received a first deed of trust on the property in Mississippi and the 80-unit condominium to be constructed thereon. Plaintiff's Exhibit 2 (Exhibit B annexed thereto).

5. In January, 1975, prior to the commencement of the Chapter XI case herein, as a result of Borrower's default on its loan agreement, FMI sought to preserve and protect its investment by commencing a non-judicial foreclosure on its first deed of trust on the subject property. Tr. at 7*.

6. In January, 1975, prior to the commencement of the Chapter XI case herein, Camelia and Farnale, as a joint venture, commenced an action against the debtor in the Circuit Court of Rankin County, Mississippi (the "State Court Action"). In the State Court Action, Camelia and Farnale sought (1) an order enforcing their purported mechanic's and materialmen's lien against the subject property; and (2) a monetary judgment against the debtor. Plaintiff's Exhibit 2 (Exhibit F annexed thereto); Defendant's Exhibit B; Tr. at 8.

7. On or about March 24, 1975, Camelia and Farnale, as a joint venture, commenced an action against FMI in

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* Numbers preceded by the prefix "Tr." shall refer to the pages of the Transcript of the Hearing held on April 10 and 11, 1975.

the United States District Court for the Southern District of Mississippi, Jackson Division [Civil Action No. J75-69(N)] (the "Mississippi Action"). Plaintiff's Exhibit 2; Tr. at 10, 112. Respondents Hubbard and Crockett are counsel for Camelia and Farnale and instituted the Mississippi Action on their behalf. Respondents Yelverton and Goodale are officers of Camelia and Farnale, respectively.

8. In the Mississippi Action, Camelia and Farnale sought relief strikingly similar to that sought in the State Court Action, requesting an order (1) enjoining FMI from proceeding with the non-judicial foreclosure sale of the subject property; (2) declaring an alleged mechanic's and materialmen's lien held by Camelia and Farnale, for services purportedly rendered prior to the institution of the Chapter XI case herein in the amount of $75,964.33 to be superior to the lien of FMI; and if the foreclosure were not enjoined (3) requiring FMI to turn over to Camelia and Farnale the proceeds of the sale to the extent of $75,-964.33. Plaintiff's Exhibit 2; Tr. at 63.

9. In the Mississippi Action, the Honorable Walter M. Nixon, U.S. District Judge, denied Camelia's and Farnale's request for an order enjoining the foreclosure sale, but directed FMI to deposit $75,964.33 with the court pending a determination of the effect of the FMI Chapter XI case upon that court's jurisdiction, which monies were deposited by FMI. Plaintiff's Exhibit 3 (pp. 36 *et seq.*); Tr. at 12-17.

10. Prior to the commencement of the Mississippi Action, the respondents were fully aware of the pendency of the Chapter XI case herein. On January 31, 1975, the day

after FMI filed its Chapter XI petition and approximately two months prior to the commencement of the Mississippi Action, Goodale read in the Wall Street Journal a new item reflecting that FMI had filed a Chapter XI petition and had so advised respondent Hubbard. Tr. at 82-85, 105-107; Court's Exhibit.

11. On or about March 20, 1975, respondents were made aware of FMI's filing of its Chapter XI petition when they received a copy of a pleading which had been filed by FMI in the State Court Action wherein FMI stated that it had filed a Chapter XI petition in this court, and that under Rule 11-44 the commencement of all suits against the debtor was stayed. Tr. at 86-88, 110-11, 118; Plaintiff's Exhibit 2 (Exhibit G annexed thereto).

12. Prior to the commencement of the Mississippi Action, Hubbard, although making no effort to contact with or inquire of FMI, did contact the clerk of the United States District Court for the Southern District of New York and confirmed that FMI had filed a Chapter XI petition. Tr. at 111-12, 115-15, 118-21. Notwithstanding such knowledge and being fully cognizant of the stay provisions contained in Rule 11-44, Hubbard wilfully and deliberately disregarded such stay and commenced the Mississippi Action on behalf of Camelia and Farnale. Tr. at 113.

13. The aforedescribed wilful and intentional contemptuous conduct on the part of respondents Camelia, Farnale, Goodale, Yelverton and Hubbard warrant the imposition of an appropriate punishment under Rule 920 of the Rules of Bankruptcy Procedure. I recommend, therefore, that, pursuant to Rule 914 and 754(b) of the

Rules of Bankruptcy Procedure, such punishment should include a taxation of all costs, inclusive of reasonable attorneys' fees, incurred or to be incurred by FMI in connection with the Mississippi Action and the proceedings herein. Furthermore, I recommend that the respondents be directed to take any and all action necessary and proper to withdraw the Mississippi action and cause the $75,964.33 deposited with the clerk of the United States District Court for the Southern District of Mississippi, Jackson Division, to be returned to FMI, if not already done.

Dated: New York, New York
July 29, 1975

/s/ ASA S. HERZOG
Bankruptcy Judge

DECISION OF PROCEEDING TO CERTIFY FOR CONTEMPT

(Number and Title Omitted)

APPEARANCES:
CHARLES SELIGSON, ESQ., and
WEIL, GOTSHAL & MANGES, ESQS.,
Attorneys for Debtor
By: RICHARD P. KRASNOW, ESQ., and
MICHAEL Z. BROWNSTEIN, ESQ.,
Of Counsel

JEFFREY H. HUBBARD, ESQ., and
ELI S. SILBERFELD, ESQ.,
Counsel for Respondents

ASA S. HERZOG, Bankruptcy Judge:

On January 29, 1975, Fidelity Mortgage Investors, (hereinafter FMI), a Massachusetts real estate investment trust, filed its petition in this court for an arrangement under Chapter XI of the Bankruptcy Act and was duly authorized to continue the conduct of its business. The filing of said petition promptly brought in to play Rule 11-44 of the Rules of Bankruptcy Procedure. That rule, insofar as applicable reads:

> "(a) *Stay of Actions and Lien Enforcement.* A petition filed under Rule 11-6 or 11-7 shall operate as a stay of the commencement or the continuation of any court or other proceeding against the debtor, or the enforcement of any judgment against him, or of any act or the commencement or continuation of any court proceeding to enforce any lien against his property, or of any court proceeding, except a case pending under Chapter X of the Act, for the purpose of the rehabilitation of the debtor or the liquidation of his estate."

On March 24, 1975, Camelia Builders, Inc. (Camelia) and Farnale Inc., (Farnale) a joint venture, commenced an action against FMI in the United States District Court for the Southern District of Mississippi, Jackson Division [Civil Action No. J75-69(N)]. (hereinafter the "Missis-

sippi action."] The respondents Hubbard and Crocket,* are counsel for Camelia and Farnale and for the joint venture and instituted the aforesaid action on their behalf. The respondent Yelverton is an employee at Camelia.

In 1972, a corporation known as Camelia Bay Corporation entered into a construction loan agreement with FMI to secure the financing of the construction of a certain project. When work on the project ceased, the joint venturers, as general contractors of the project, filed a lien and instituted suit in the Rankin County, Mississippi, Circuit Court to enforce the lien and for a monetary judgment. In March 1975 FMI sought to foreclose its lien on the project by power of sale — a non-judicial foreclosure sale.

The action in the United States District Court (the Mississippi action) sought an order: (1) enjoining FMI from proceeding on March 28, 1975 with the non-judicial sale; (2) declaring the contractors' alleged mechanic's and materialmen's lien for services purportedly rendered prior to institution of this Chapter XI case in the amount of $75,964.33, to be superior to the lien of FMI, and, if the foreclosure sale were not enjoined, (3) requiring FMI to turn over to the contractors the proceeds of the sale to the extent of $75,964.33.

Thereupon, FMI, as plaintiff commenced this adversary proceeding for an order adjudging the respondents guilty of civil contempt for wilful violation of the automatic stay of Rule 11-44 and for a certification to the district court pursuant to Rule 920, and for a judgment

* The complaint has been withdrawn as against the respondent Crocket.

awarding costs for the expenses incurred as the result of respondents' conduct, including reasonable counsel fees.

Section 41 of the Act (11 U.S.C. §69) provides that

> "A person shall not, in a proceeding before a referee, (1) disobey or resist any lawful order, process or writ . . . ."

Rule 920, relating to contempt committed in proceedings before a referee gives the referee the power to summarily punish for contempt, but limits the punishment which may be meted out to a fine of $250. However, Subdivision (a)(4) of the Rule provides:

> "(4) *Certification to District Judge.* If it appears to a referee that conduct prohibited by §41a of the Act may warrant punishment by imprisonment or by a fine of more than $250, he may certify the facts to the district judge. On such certification the judge shall proceed as for a contempt not committed in his presence."

The plaintiff, FMI, in its complaint seeks a certification to the district judge. In my view, if indeed a wilful disobedience of the stay provisions of Rule 11-44 occurred, the misbehavior is grave enough to warrant certification to a district judge. If Rule 11-44 is to serve its purpose, a wilful and deliberate violation of its provisions cannot be countenanced and should result in more than the limited punishment permissible under Rule 920.

There is no doubt that the respondents were fully aware of the pendency of the Chapter XI case in this court.

Goodale, president of Farnale testified that he read The Wall Street Journal news item which boldly reported the filing of the petition of "Fidelity Mortgage, a sizable real estate investment trust," and "made a comment" of it to respondent Hubbard. Mr. Hubbard testified he had conversations concerning the FMI bankruptcy situation before institution of the Mississippi action, and that he made several calls to the Clerk of the District Court in New York. At the very least, Mr. Hubbard was under a duty to make inquiry, as he freely admitted, but decided to "try to hedge my bet" (Smp 113) and take a chance on violating Rule 11-44 (Smp 114). He made no effort to make direct contact with or inquiry of FMI. Mr. Hubbard was well aware of Rule 11-44, but took his chance that his action would fall within 28 U.S.C. §959. Under no circumstances can he assert that his action and that of his clients were inadvertent or due to mistake or ignorance of the facts.

On the evidence adduced before me and the exhibits introduced in evidence, I am constrained to find that in instituting the Mississippi action, the respondents wilfully and deliberately violated the stay provisions of Rule 11-44, or, at the very least, treated the Rule so cavalierly as to constitute a complete disregard for the consequences of their conduct.

Mr. Hubbard testified that "I felt I had a lawsuit under 28 U.S.C. §959 to bring into the Federal Court" and indeed, he relies upon that section of the United States Code to relieve himself of responsibility for violation of the stay. From all the circumstances of the case, my distinct impression is that 28 U.S.C. §959 was an afterthought brought to light after the event for the purpose of justify-

ing the deliberate violation of the stay provisions of Rule 11-44.

28 U.S.C. §959 insofar as is relevant, provides:

> a. Trustees, receivers or managers of any property, including debtors-in-possession, may be sued, without leave of the court appointing them, *with respect to any of their acts or transactions in carrying on business connected with such property.* Such actions shall be subject to the general equity power of such court so far as the same may be necessary to the ends of justice, but this shall not deprive a litigant of his right to trial by jury. [Emphasis supplied.]

Respondents' reliance on 28 U.S.C. §959 is misplaced. This section was intended to create a general exception to the rule that suits against receivers and trustees may not be brought without leave of the court. *Vass* v. *Conron Bros. Co.*, 59 F.2d 969, 970 (2d Cir. 1932). But the exception is limited to actions directly related to acts or transactions of receivers and trustees "in carrying on the business" connected with the property entrusted to them. See *Austrian* v. *Williams*, 216 F.2d 278 (2d Cir. 1954) cert. den. 348 U.S. 953 (1955); *In re American Associated Systems Inc.*, 353 F. Supp. 977 (E.D. Ky. 1974)

In the last mentioned case the court said:

> "The exception created in 28 U.S.C. §959(a) is intended to permit actions redressing torts committed in furtherance of the bankruptcy business operations, and is not cast to foster interferences

> '[with] the use, control, maintenance and operation of the bankrupt's property . . .' " (Emphasis added.)

The difficulty with respondents' position is that the Mississippi action brought by them is not at all related to the operation of FMI's business. FMI, a real estate investment trust, was engaged in advancing money for construction projects and its proposed foreclosure sale was not concerned with the operation of its business. FMI, as a debtor in possession, by virtue of §342 of the Bankruptcy Act "shall have all the title and exercise all the powers of a trustee appointed under this Act . . ." It was not part of FMI's business to foreclose mortgages, but it *was* FMI's duty and obligation to preserve and protect the debtor's rights, title or interests in property. The distinction was clearly pointed out in *American Brake Shoe & F.Co. v. Interborough R. T. Co.*, 10 F. Supp. 512 (S.D.N.Y. 1935) wherein Circuit Judge Julian Mack pointed out that §66 of the Judicial Code (now 28 U.S.C. §959) "does not embrace suits intended to establish liens or possessory or ownership rights in the receivership res." A stay of the foreclosure sale, or a declaration that respondents have a lien superior to FMI, or requiring FMI to turn over $75,964.33 would be "as much an interference with the administration of that property as a decision on questions of title and possession of the res."

The respondents, by instituting the Mississippi action, were attempting to protect a pre-petition indebtedness by enforcing a mechanic's lien, an action totally unrelated to operation of the debtor's business. This is borne out by the suit previously instituted by the respondents in the Circuit Court of Rankin County, Mississippi, in January

1975, prior to the filing of the Chapter XI petition, in which they sought to enforce their alleged mechanic's lien and obtain a money judgment — relief strikingly similar to the relief sought in the other Mississippi action.

I must conclude that the nonjudicial foreclosure sale was a necessary step in protecting and administering the estate, a duty imposed on a debtor in possession whether or not authorized to operate the business.

Bankruptcy Rule 610, made applicable to Chapter XI cases by Rule 11-57, reads:

> "The trustee or receiver may, *with or without court approval*, prosecute or enter his appearance and defend any pending action or proceeding by or against the bankrupt, or commence and prosecute any action or proceeding in behalf of the estate, before any tribunal." (Emphasis added.)

Thus, the debtor in possession, even had it not been authorized to conduct the business, could without court approval commence any action or proceeding on behalf of the estate. Surely, its duty to preserve the estate required that it enforce its lien by whatever means available, and here it elected to proceed by nonjudicial sale. Such action, it must be reiterated, is unrelated to "conduct of the business" in the usual sense of the term.

In *Austrian* v. *Williams*, 216 F.2d 278 (2d Cir. 1954) cert. den. 348 U.S. 953 (1955) it was held that a suit by trustees against debtor's officers, directors and stockholders charging them with various derelictions in management,

constituted the collection and liquidation of assets and was not "carrying on business."

> "Merely to attempt to collect and liquidate the assets of a debtor is not to carry on its business in any proper sense of the term."

The debtor's mortgage or lien on the property subject to the proposed nonjudicial sale is a property interest subject to the jurisdiction of this court, and respondents by the Mississippi action seek to subordinate the debtor's lien to their own, clearly an action against property in *custodia legis*. A proceeding to "determine the validity, priority or extent of a lien or other interest in property" is an adversary proceeding governed by Part VII of the Bankruptcy Rules [Rule 11-61-(a)(2)] and commenced by a complaint and a summons issued by the Bankruptcy Court. [Rule 11-61 and Bankruptcy Rules 704, 705.]

Institution of the Mississippi action required the permission of this court. 28 U.S.C. §959 was not intended to allow such suits to be brought without leave of the court which has the property in its custody. As pointed out in *American Brake Shoe and Foundry Co.* v. *Interboro R. T. Co., supra*, any other conclusion could only lead to conflict and confusion in administration. Such was not the legislative purpose. In fact just such a conflict has arisen between this court and the Mississippi District Court where the District Judge is graciously awaiting a decision from this court as to jurisdiction of the res.

Rule 11-44 is broadly drafted and pervasive. It stays commencement or continuation of any "court

proceeding"against the debtor, or any "act or the commencement of any court proceeding to enforce any lien" against his property. The Mississippi action violates the very root of the rule: It seeks not only to stay the debtor in possession from performing its statutory duty to protect its interest in the property, but seeks to have its lien declared superior to that of the debtor's, and to aggravate matters, it seeks an order to the effect that if the nonjudicial sale proceeds, the debtor in possession "turn over" $75,964.33. There is no doubt that the rule has been violated.

I have already stated my finding that the respondents instituted the Mississippi action knowing full well that a Chapter XI proceeding was pending in this court. Giving the kindest interpretation to Mr. Hubbard's testimony, he knew at the very least that some kind of a "bankruptcy" case was pending. He was also well aware of the automatic stay provisions of the Bankruptcy Rules. But he chose to proceed, gambling that he would fall with 28 U.S.C. §959. I think he played fast and loose with the Rules by, in his own language, "hedging his bet." It only indicates to me a contemptuous attitude to Rules which have the sanction of the Supreme Court and of the Congress of the United States. I don't think there is room for hedging.

The rule is equivalent to an order of the court and if acts are done in clear contravention thereof, the intention is of no consequence. As the court said in *In re American Associated Systems, Inc., supra* at p. 979:

> "The absence of wilfulness does not relieve an individual from civil contempt since it is a sanction

> to enforce compliance with an order of the court and is not dependent on the state of mind of the individual."

See also *N.L.R.B.* v. *Ralph Printing & Lithographing Company*, 433 F.2d 1058, 1062 (1970), *cert. den.* 401 U.S. 925 (1971).

This court is loathe to certify an attorney for contempt but if an attorney will not recognize and honor the obligation to obey the automatic stay provisions of the Rules, how could laymen be expected to do so. As an officer of the court the duty falls on the attorney to counsel his client that respect for the law requires the rules of the court cannot be ignored. The respondent cited Maness v. Meyers, ___ U.S. ___, 95 S.Ct. 584 (1975) to support his position but overlooks Chief Justice Berger's statement:

> "A lawyer who counsels his client not to comply with a court order during trial would, first, subject his client to contempt, and in addition, if he persisted the lawyer would be exposed to sanctions for obstructing the trial." 42 L.Ed. 2d at 584.

Proper conduct on Mr. Hubbard's part would require that he either apply to this court for leave to institute suit in Mississippi, or alternatively, to annul, vacate or modify the automatic stay, a procedure for which ample provision is made in Rule 11-44.

Under all the circumstances I conclude that the respondents are guilty of a contempt of this court and that a certificate should issue to the district judge. The

respondents will be stayed from proceeding with the Mississippi action pending ultimate disposition of such certificate. The certificate shall contain recommendations that pursuant to Bankruptcy Rules 914 and 754(b) the district judge impose the costs incurred by the debtor in possession in connection with the Mississippi action in this proceeding should include reasonable counsel fee.

Settle order in conformity with the foregoing on 10 days' notice.

Dated: New York, New York
July 14, 1975.

/s/ ASA S. HERZOG
Bankruptcy Judge

APPENDIX V

11 USC § 69. Contempts before referees

(a) A person shall not, in proceedings before a referee, (1) disobey or resist any lawful order, process, or writ; (2) misbehave during a hearing or so near the place thereof as to obstruct the same; (3) neglect to produce, after having been ordered to do so, any pertinent document; or (4) refuse to appear after having been subpenaed, or, upon appearing, refuse to take the oath as a witness, or having taken the oath, refuse to be examined according to law: *Provided*, That a person other than a bankrupt or, where the bankrupt is a corporation, its officers, or the members of its board of directors or trustees or of other similar con-

trolling bodies, shall not be required to attend as a witness before a referee at a place more than one hundred miles from such person's place of residence or unless his lawful mileage and fee for one day's attendance shall be first paid or tendered to him.

(b) The referee shall forthwith certify the facts to the judge, if any person shall do any of the things forbidden in this section, and he may serve or cause to be served upon such person an order requiring such person to appear before the judge upon a day certain to show cause why he should not be adjudged in contempt by reason of the facts so certified. The judge shall thereupon, in a summary manner, hear the evidence as to the acts complained of and, if it is such as to warrant him in so doing, punish such person in the same manner and to the same extent as for a contempt committed before him, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of the court of bankruptcy or in the presence of the judge.

28 U.S.C. § 959. Trustees and receivers suable; management; State law.

(a) Trustees, receivers or managers of any property, including debtors in possession, may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property. Such actions shall be subject to the general equity power of such court so far as the same may be necessary to the ends of justice, but this shall not deprive a litigant of his right to trial by jury.

(b) A trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.

11 U.S.C. § 711. Exclusive jurisdiction of debtor and property

Where not inconsistent with the provisions of this chapter, the court in which the petition is filed shall, for the purposes of this chapter, have exclusive jurisdiction of the debtor and his property, wherever located.

18 U.S.C. § 401. Power of court

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as —

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

11 U.S.C. § 107. Liens and fraudulent transfers

(a) (1) Every lien against the property of a person obtained by attachment, judgment, levy, or other legal or

equitable process of proceedings within four months before the filing of a petition initiating a proceeding under this title by or against such person shall be deemed null and void (a) if at the time when such lien was obtained such person was insolvent or (b) if such lien was sought and permitted in fraud of the provisions of this title: *Provided, however,* That if such person is not finally adjudged a bankrupt in any proceeding under this title and if no arrangement or plan is proposed and confirmed, such lien shall be deemed reinstated with the same effect as if it had not been nullified and voided.

(2) If any lien deemed null and void under the provisions of paragraph (1) of this subdivision, has been dissolved by the furnishing of a bond or other obligation, the surety on which has been indemnified directly or indirectly by the transfer of or the creation of a lien upon any of the nonexempt property of a person before the filing of a petition initiating a proceeding under this title by or against him, such indemnifying transfer or lien shall also be deemed null and void: *Provided, however,* That if such person is not finally adjudged a bankrupt in any proceeding under this title, and if no arrangement or plan is proposed and confirmed, such transfer or lien shall be deemed reinstated with the same effect as if it had not been nullified and voided.

(3) The property affected by any lien deemed null and void under the provisions of paragraphs (1) and (2) of this subdivision a shall be discharged from such lien, and such property and any of the indemnifying property transferred to or for the benefit of a surety shall pass to

the trustee or debtor, as the case may be, except that the court may on due notice order any such lien to be preserved for the benefit of the estate, and the court may direct such conveyance as may be proper or adequate to evidence the title thereto of the trustee or debtor, as the case may be: *Provided, however,* That the title of a bona-fide purchaser of such property shall be valid, but if such title is acquired otherwise than at a judicial sale held to enforce such lien, it shall be valid only to the extent of the present consideration paid for such property.

(4) The court shall have summary jurisdiction of any proceeding by the trustee or debtor, as the case may be, to hear and determine the rights of any parties under this subdivision. Due notice of any hearing in such proceeding shall be given to all parties in interest, including the obligee of a releasing bond or other like obligation. Where an order is entered for the recovery of indemnifying property in kind or for the avoidance of an indemnifying lien, the court, upon application of any party in interest, shall in the same proceeding ascertain the value of such property or lien, and if such value is less than the amount for which such property is indemnity or than the amount of such lien, the transferee or lienholder may elect to retain such property or lien upon payment of its value, as ascertained by the court, to the trustee or debtor, as the case may be, within such reasonable times as the court shall fix.

(5) The liability of a surety under a releasing bond or other like obligation shall be discharged to the extent of the value of the indemnifying property recovered or the indemnifying lien nullified and voided by the trustee or debtor, or, where the property is retained pursuant to the provisions of paragraph (4) of this subdivision, to the extent of the amount paid to the trustee or debtor.

(b) The provisions of section 96 of this title to the contrary notwithstanding and except as otherwise provided in subdivision (c) of this section, statutory liens in favor of employees, contractors, mechanics, or any other class of persons, and statutory liens for taxes and debts owing to the United States or to any State or any subdivision thereof, created or recognized by the laws of the United States or any State, may be valid against the trustee, even though arising or perfected while the debtor is insolvent and within four months prior to the filing of the petition initiating a proceeding under this title by or against him.

(c) (1) The following liens shall be invalid against the trustee:

(A) every statutory lien which first becomes effective upon the insolvency of the debtor, or upon distribution or liquidation of his property, or upon execution against his property levied at the instance of one other than the lienor;

(B) every statutory lien which is not perfected or enforceable at the date of bankruptcy against one acquiring the rights of a bona fide purchaser from the debtor on that date, whether or not such purchaser exists: *Provided,* That where a statutory lien is not invalid at the date of bankruptcy against the trustee under subdivision (c) of section 110 of this title and is required by applicable lien law to be perfected in order to be valid against a subsequent bona fide purchaser, such a lien may nevertheless be valid under this subdivision if perfected within the time permitted by and in accordance with the requirements of such law: *And provided further,* That if applicable lien law requires a lien valid against the trustee under section 110(c) of

this title to be perfected by the seizure of property, it shall instead be perfected as permitted by this subdivision by filing notice thereof with the court;

(C) every statutory lien for rent and every lien of distress for rent, whether statutory or not. A right of distress for rent which creates a security interest in property shall be deemed a lien for the purposes of this subdivision.

(2) The court may, on due notice, order any of the aforesaid liens invalidated against the trustee to be preserved for the benefit of the estate and in that event the lien shall pass to the trustee. A lien not preserved for the benefit of the estate but invalidated against the trustee shall be invalid as against all liens indefeasible in bankruptcy, so as to have the effect of promoting liens indefeasible in bankruptcy which would otherwise be subordinate to such invalidated lien. Claims for wages, taxes, and rent secured by liens hereby invalidated or preserved shall be respectively allowable with priority and restricted as are debts therefor entitled to priority under clauses (2), (4), and (5) of subdivision (a) of section 104 of this title, even though not otherwise granted priority.

(3) Every tax lien on personal property not accompanied by possession shall be postponed in payment to the debts specified in clauses (1) and (2) of subdivision (a) of section 104 of this title. Where such a tax lien is prior in right to liens indefeasible in bankruptcy, the court shall order payment from the proceeds derived from the sale of the personal property to which the tax lien attaches, less the actual cost of that sale, of an amount not in excess of the tax lien, to the debts specified in clauses (1) and (2) of

subdivision (a) of section 104 of this title. If the amount realized from the sale exceeds the total of such debts, after allowing for prior indefeasible liens and the cost of the sale, the excess up to the amount of the difference between the total paid to the debts specified in clauses (1) and (2) of subdivision (a) of section 104 of this title and the amount of the tax lien, is to be paid to the holder of the tax lien.

(4) Where a penalty not allowable under subdivision (j) of section 93 of this title is secured by a lien, the portion of the lien securing such penalty shall not be eligible for preservation under this subdivision.

(5) This subdivision shall not apply to liens enforced by sale before the filing of the petition, nor to liens against property set aside to the bankrupt as exempt, nor to liens against property abandoned by the trustee or unadministered in bankruptcy for any reason and shall not apply in proceedings under section 205 of this title, nor in proceedings under chapter 10 of this title unless an order has been entered directing that bankruptcy be proceeded with.

(d) (1) For the purposes of, and exclusively applicable to, this subdivision: (a) "Property" of a debtor shall include only his nonexempt property; (b) "debt" is any legal liability, whether matured or unmatured, liquidated or unliquidated, absolute, fixed, or contingent; (c) "creditor" is a person in whose favor a debt exists; (d) a person is "insolvent" when the present fair salable value of his property is less than the amount required to pay his debts; and to determine whether a partnership is insolvent, there shall be added to the partnership property the present fair salable value of the separate property of each general partner in excess of the amount required to pay

his separate debts, and also the amount realizable on any unpaid subscription to the partnership of each limited partner; and (e) consideration given for the property or obligation of a debtor is "fair" (1) when, in good faith, in exchange and as a fair equivalent therefor, property is transferred or an antecedent debt is satisfied, or (2) when such property or obligation is received in good faith to secure a present advance or antecedent debt in an amount not disproportionately small as compared with the value of the property or obligation obtained.

(2) Every transfer made and every obligation incurred by a debtor within one year prior to the filing of a petition initiating a proceeding under this title by or against him is fraudulent (a) as to creditors existing at the time of such transfer or obligation, if made or incurred without fair consideration by a debtor who is or will be thereby rendered insolvent, without regard to his actual intent; or (b) as to then existing creditors and as to other persons who become creditors during the continuance of a business or transaction, if made or incurred without fair consideration by a debtor who is engaged or is about to engage in such business or transaction, for which the property remaining in his hands is an unreasonably small capital, without regard to his actual intent; or (c) as to then existing and future creditors, if made or incurred without fair consideration by a debtor who intends to incur or believes that he will incur debts beyond his ability to pay as they mature; or (d) as to then existing and future creditors, if made or incurred with actual intent as distinguished from intent presumed in law, to hinder, delay, or defraud either existing or future creditors.

(3) Every transfer made and every obligation incurred by a debtor who is or will thereby be rendered insolvent, within four months prior to the filing of a petition initiating a proceeding under this title by or against him is fraudulent, as to then existing and future creditors: (a) if made or incurred in contemplation of the filing of a petition initiating a proceeding under this title by or against the debtor or in contemplation of liquidation of all or the greater portion of the debtor's property, with intent to use the consideration obtained for such transfer or obligation to enable any creditor of such debtor to obtain a greater percentage of his debt than some other creditor of the same class, and (b) if the transferee or obligee of such transfer or obligation, at the time of such transfer or obligation, knew or believed that the debtor intended to make such use of such consideration. The remedies of the trustee for the avoidance of such transfer or obligation and of any ensuing preference shall be cumulative: *Provided, however,* That the trustee shall be entitled to only one satisfaction with respect thereto.

(4) Every transfer of partnership property and every partnership obligation incurred within one year prior to the filing of a petition initiating a proceeding under this title by or against the partnership, when the partnership is insolvent or will be thereby rendered insolvent, is fraudulent as to partnership creditors existing at the time of such transfer or obligation, without regard to actual intent if made or incurred (a) to a partner, whether with or without a promise by him to pay partnership debts, or (b) to a person not a partner without fair consideration to the partnership as distinguished from consideration to the individual partners.

(5) For the purposes of this subdivision, a transfer shall be deemed to have been made at the time when it became so far perfected that no bona fide purchaser from the debtor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein, but, if such transfer is not so perfected prior to the filing of the petition initiating a proceeding under this title, it shall be deemed to have been made immediately before the filing of such petition.

(6) A transfer made or an obligation incurred by a debtor adjudged a bankrupt under this title, which is fraudulent under this subdivision against creditors of such debtor having claims provable under this title, shall be null and void against the trustee, except as to a bona fide purchaser, lienor, or obligee for a present fair equivalent value: *Provided, however,* That the court may, on due notice, order such transfer or obligation to be preserved for the benefit of the estate and, in such event, the trustee shall succeed to and may enforce the rights of such transferee or obligee: *And provided further,* That such purchaser, lienor, or obligee, who without actual fraudulent intent has given a consideration less than fair, as defined in this subdivision, for such transfer, lien, or obligation, may retain the property, lien, or obligation as security for repayment.

(7) Nothing contained in this subdivision d shall be construed to validate a transfer which is voidable under section 96 of this title.

(e) For the purpose of any recovery or avoidance under this section, where plenary proceedings are necessary, any State court which would have had jurisdiction if

bankruptcy had not intervened and any court of bankruptcy shall have concurrent jurisdiction.

(f) (1) For the purposes of, and exclusively applicable to, this subdivision: (a) "debtor" shall mean a face-amount certificate company as defined in section 80a-4 of Title 15; (b) "face-amount certificate" shall mean a face-amount certificate as defined in section 80a-2 of Title 15; (c) "depositary" is a person or State agency with whom securities or other property of a debtor is deposited or to whom property of a debtor is transferred, in trust or otherwise, pursuant to the requirements of a State law or an agreement by the debtor providing for the distribution of such property or its proceeds to creditors or security holders of the debtor in the event of the insolvency of the debtor or under other specified circumstances; (d) "deposit creditor" is a creditor who, under the provisions of a State law or agreement providing for a deposit with or transfer to a depositary, has rights as to the securities or property so deposited or transferred which exceed the rights of a general creditor; and (e) "State agency" is an official or agency of a State designated to act as depositary or to distribute property or the proceeds of property held by a depositary.

(2) Every deposit or transfer of securities or other property made by or on behalf of a debtor with or to any depositary for the benefit or protection of or to secure the holder of any security sold by or on behalf of the debtor on or after January 1, 1941, shall be voidable as against the trustee of such debtor if the property of the estate is insufficient for the full payment and discharge of all claims on account of all face-amount certificates sold by or on behalf of the debtor, and such deposit or transfer and

every lien created thereby shall thereupon be avoided by the trustee subject to the provisions of paragraph 3 of this subdivision.

(3) In the event any deposit or transfer described in paragraph 2 of this subdivision shall be avoided the trustee shall segregate the property received by the trustee from the depositary and charge the same with the costs and expenses of maintenance and liquidation and distribute the net proceeds thereof to the creditors who would have been entitled thereto under the provisions of the law or agreement providing for the deposit or transfer of the property, and each such creditor shall thereafter be entitled to dividends from the estate only after all creditors of the same rank shall have received the same percentage.

(4) The court shall have summary jurisdiction of any proceedings to hear and determine the rights of any parties under this subdivision and to hear and determine the sufficiency of the property of the estate for the full payment and discharge of all claims on account of all face-amount certificates sold by or on behalf of the debtor. Due notice of any hearing in such proceedings shall be given to every depositary and State agency which is a party in interest.

(5) Where the provisions of subsection (c) of section 28 are not applicable, the provisions of this section will not apply.

11 U.S.C. § 1. Meaning of words and phrases

The words and phrases used in this title and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows:

(9) "Court" shall mean the judge or the referee of the court of bankruptcy in which the proceedings are pending;

11 U.S.C. § 46. Jurisdiction of controversies between receivers and trustees and adverse claimants

(a) The United States district courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings under this title, between receivers and trustees as such and adverse claimants, concerning the property acquired or claimed by the receivers or trustees, in the same manner and to the same extent as though such proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

(b) Suits by the receiver and the trustee shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings under this title had not been instituted, unless by consent of the defendant, except as provided in sections 96, 107, and 110 of this title.

APPENDIX VI

Rule 37.

FAILURE TO MAKE DISCOVERY: SANCTIONS

(a) Motion for Order Compelling Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) *Appropriate Court.* An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(2) *Motion.* If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b) (6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

(3) *Evasive or Incomplete Answer.* For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) *Award of Expenses of Motion.* If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances made an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failu[illegible] to Comply with Order.

(1) *Sanctions by Court in District Where Deposition is Taken.* If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) *Sanctions by Court in Which Action is Pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b) (6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) *Expenses on Failure to Admit.* If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) *Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b) (6) or 31(a) to testify on behalf of a party fails (1) to

appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b) (2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

(e) *Subpoena of Person in Foreign Country.* A subpoena may be issued as provided in Title 28 U.S.C. § 1783, under the circumstances and conditions therein stated.

(f) *Expenses Against United States.* Except to the extent permitted by statute, expenses and fees may not be awarded against the United States under this rule.

As amended.

Rule 45.

SUBPOENA

(a) *For Attendance of Witnesses; Form; Issuance.* Every subpoena shall be issued by the clerk under the seal of the court, shall state the name of the court and the title of the action, and shall command each person to whom it is directed to attend and give testimony at a time and place therein specified. The clerk shall issue a subpoena, or a subpoena for the production of documentary evidence, signed and sealed but otherwise in blank, to a party requesting it, who shall fill it in before service.

(b) *For Production of Documentary Evidence.* A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

(c) *Service.* A subpoena may be served by the marshal, by his deputy, or by any other person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and by tendering to him the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered.

(d) *Subpoena for Taking Depositions; Place of Examination.*

(1) Proof of service of a notice to take a deposition as provided in Rules 30(b) and 31(a) constitutes a sufficient authorization for the issuance by the clerk of the district court for the district in which the deposition is to be taken of subpoenas for the persons named or described therein. The subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, or tangible things which constitute or contain matters within the scope of the examination permitted by Rule 26(b), but in that event the subpoena will be subject to the provisions of Rule 26(c) and subdivision (b) of this rule.

The person to whom the subpoena is directed may, within 10 days after the service thereof or on or before the time specified in the subpoena for compliance if such time is less than 10 days after service, serve upon the attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials except pursuant to an order of the court from which the subpoena was issued. The party serving the subpoena may, if objection has been made, move upon notice to the deponent for an order at any time before or during the taking of the deposition.

(2) A resident of the district in which the deposition is to be taken may be required to attend an examination only in the county wherein he resides or is employed or transacts his business in person, or at such other con-

venient place as is fixed by an order of court. A nonresident of the district may be required to attend only in the county wherein he is served with a subpoena, or within 40 miles from the place of service, or at such other convenient place as is fixed by an order of court.

(e) *Subpoena for a Hearing or Trial.*

(1) At the request of any party subpoenas for attendance at a hearing or trial shall be issued by the clerk of the district court for the district in which the hearing or trial is held. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the district, or at any place without the district that is within 100 miles of the place of the hearing or trial specified in the subpoena; and, when a statute of the United States provides therefor, the court upon proper application and cause shown may authorize the service of a subpoena at any other place.

(2) A subpoena directed to a witness in a foreign country shall issue under the circumstances and in the manner and be served as provided in Title 28, U.S.C. § 1783.

(f) *Contempt.* Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued.

Rule 70.

JUDGMENT FOR SPECIFIC ACTS; VESTING TITLE

If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party. On application of the party entitled to performance, the clerk shall issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment. The court may also in proper cases adjudge the party in contempt. If real or personal property is within the district, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law. When any order or judgment is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of execution or assistance upon application to the clerk.

APPENDIX VII

Rule 215. Employment of Attorneys and Accountants

(a) Conditions of Employment of Attorneys and Accountants. No attorney or accountant for the trustee or receiver shall be employed except upon order of the court. The order shall be made only upon application of the trustee or receiver, stating the specific facts showing the necessity for such employment, the name of the attorney or accountant, the reasons for his selection, the

professional services he is to render, and to the best of the applicant's knowledge all of the attorney's or accountant's connections with the bankrupt, the creditors or any other party in interest, and their respective attorneys and accountants. If the attorney or accountant represents or holds no interest adverse to the estate in the matters upon which he is to be engaged, and his employment is in the best interest of the estate, the court may authorize his employment. Notwithstanding the foregoing sentence, the court may authorize the employment of an attorney or accountant who has been employed by the bankrupt when such employment is in the best interest of the estate. The employment of any attorney or accountant shall be only for the purposes specified in the order, but the court may authorize a general retainer of an attorney when necessity therefor is shown.

(b) Employment of Attorney or Accountant with Adverse Interest. If without disclosure any attorney or accountant employed by the trustee or receiver shall represent or hold, or shall have represented or held, any interest adverse to the estate in any matter upon which he is so employed, the court may deny the allowance of any compensation to such attorney or accountant, or the reimbursement of his expenses, or both, and may also deny any allowance to the trustee or receiver if it shall appear that he failed to make diligent inquiry into the connections of such attorney or accountant.

(c) Employment by a General Creditor. An attorney or accountant shall not be disqualified to act as attorney or accountant for the trustee or the receiver merely because of his employment by a general creditor in the case.

(d) Employment of Attorney or Accountant on Salary. A trustee or receiver authorized to operate the business and manage the property of the bankrupt may, without specific authorization under subdivision (a) of this rule, continue or engage any attorney or accountant as a salaried employee if such employment is necessary in the operation of the business and management of the property of the bankrupt.

(e) Employment of Trustee or Receiver as Attorney or Accountant. The court may authorize the trustee or receiver to act as an attorney or accountant for the estate if such authorization is in the best interest of the estate.

(f) Services Rendered by Member or Associate of Firm of Attorneys or Accountants. If, under this rule, a law partnership or corporation is employed as an attorney, or an accounting partnership or corporation is employed as an accountant, or if a named attorney or accountant is employed on behalf of a professional partnership or corporation, any member or regular associate of the firm may act for the attorney or accountant so employed, without further order of the court, and his services may be compensated as services of the attorney or accountant in accordance with Rule 219.

Rule 920. Contempt Proceedings

(a) Contempt Committed in Proceedings Before Referee.

(1) *Summary Disposition by Referee.* Misbehavior prohibited by §41a(2) of the Act may be punished summarily by the referee as contempt if he

saw or heard the conduct constituting the contempt and it was committed in his actual presence. The order of contempt shall recite the fact and shall be signed by the referee and entered of record.

(2) *Disposition by Referee upon Notice and Hearing.* Any other conduct prohibited by § 41a of the Act may be punished by the referee only after hearing on notice. The notice shall be in writing and shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the contempt charged and whether the contempt is criminal or civil or both. The notice may be given on the referee's own initiative or on motion by a party, by the United States attorney, or by an attorney appointed by the referee for that purpose. If the contempt charged involves disrespect to or criticism of the referee, he is disqualified from presiding at the hearing except with the consent of the person charged.

(3) *Limits on Punishment by Referee.* A referee shall not order inprisonment nor impose a fine of more than $250 as punishment for any contempt, civil or criminal.

(4) *Certification to District Judge.* If it appears to a referee that conduct prohibited by § 41a of the Act may warrant punishment by imprisonment or by a fine of more than $250, he may certify the facts to the district judge. On such certification the judge shall proceed as for a contempt not committed in his presence.

(b) Contempt Committed in Proceedings Before District Judge. Any contempt committed in proceedings before a district judge whild acting as a bankruptcy judge shall be prosecuted as any other contempt of the district court.

(c) Right to Jury Trial. Nothing in this rule shall be construed to impair the right to jury trial whenever it otherwise exists.

Rule 770. Judgment for Specific Acts; Vesting Title

If a judgment directs a party to execute a transfer or to deliver a document or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party. On application of the party entitled to performance, the court shall issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment. In proper cases the disobedient party may also be held in contempt in proceedings under Rule 920. The court in lieu of directing a transfer of real or personal property may enter a judgment divesting the title of any party thereto and vesting it in others and such judgment has the effect of a transfer executed in due form of law. When any judgment is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of execution or assistance upon application to the court.

Rule 401. Petition as Automatic Stay of Certain Actions on Unsecured Debts

(a) Stay of Actions. The filing of a petition shall operate as a stay of the commencement or continuation of any action against the bankrupt, or the enforcement of any judgment against him, if the action or judgment is founded on an unsecured provable debt other than one not dischargeable under clause (1), (5), (6), or (7) of § 17a of the Act.

(b) Duration of Stay. Except as it may be deemed annulled under subdivision (c) or may be terminated, annulled, or modified by the bankruptcy court under subdivision (d) or (e) of this rule, the stay shall continue until the bankruptcy case is dismissed or the bankrupt is denied a discharge or waives or otherwise loses his right thereto.

(c) Annulment of Stay. At the expiration of 30 days after the first date set for the first meeting of creditors, the stay provided by this rule shall be deemed annulled as against any creditor whose debt has not been duly scheduled and who has not filed his claim by that time.

(d) Relief from Stay. On the filing of a complaint by a creditor seeking relief from a stay provided by this rule, the bankruptcy court shall set the trial for the earliest possible date, and it shall take precedence over all matters except older matters of the same character. The court may, for cause shown, terminate, annul, modify, or condition such stay.

(e) Availability of Other Relief. Nothing in this rule precludes the issuance of, or relief from, any stay,

restraining order, or injunction when otherwise authorized.

Rule 601. Petition as Automatic Stay Against Lien Enforcement

(a) Stay Against Lien Enforcement. The filing of a petition shall operate as a stay of any act or the commencement or continuation of any court proceeding to enforce (1) a lien against property in the custody of the bankruptcy court, or (2) a lien against the property of the bankrupt obtained within 4 months before bankruptcy by attachment, judgment, levy, or other legal or equitable process or proceedings.

(b) Duration of Stay. Except as it may be terminated, annulled, or modified by the bankruptcy court under subdivision (c), (d), or (e) of this rule, the stay shall continue until the bankruptcy case is dismissed or closed, or until the property subject to the lien is, with the approval of the court, set apart as exempt, abandoned, or transferred.

(c) Relief from Stay. On the filing of a complaint seeking relief from a stay provided by this rule, the bankruptcy court shall, subject to the provisions of subdivision (d) of this rule, set the trial for the earliest possible date, and it shall take precedence over all matters except older matters of the same character. The court may, for cause shown, terminate, annul, modify, or condition such stay. A party seeking continuation of a stay against lien enforcement shall show that he is entitled thereto.

(d) Ex Parte Relief from Stay. On the filing of a complaint seeking relief from a stay provided by this rule,

relief may be granted without written or oral notice to the adverse party if (1) it clearly appears from specific facts shown by affidavit or by a verified complaint that immediate and irreparable injury, loss, or damage will result to the plaintiff before the adverse party or his attorney can be heard in opposition, and (2) the plaintiff's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. The party obtaining relief under this subdivision shall give written or oral notice thereof as soon as possible to the trustee or receiver or, if none has qualified, to the petitioner or petitioners and, in any event, shall forthwith mail to such person or persons a copy of the order granting relief. On 2 days' notice to the party who obtained relief from a stay provided by this rule without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its reinstatement, and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(e) Availability of Other Relief. Nothing in this rule precludes the issuance of, or relief from, any stay, restraining order, or injunction when otherwise authorized.

Rule 602. Duty of Trustee or Receiver to Give Notice of Bankruptcy

(a) Real Property. As soon as possible after his qualification a receiver shall record a certified copy of the petition without schedules or of the order of adjudication, if any, in the office where transfers of real property are

recorded in every county where the bankrupt has an interest in real property not exempt from execution. If a certified copy of the petition or order of adjudication has not previously been recorded in an office where recordation is required by the preceding sentence, the trustee shall as soon as possible after his qualification record in every such office a certified copy of the petition without schedules or of the order of adjudication, if any, or of the order approving his bond. The recording of a copy pursuant to this subdivision is not necessary, however, in the county in which is kept the record of the original proceedings in the case or in any office where such a copy has previously been recorded.

(b) Personal Property. As soon as possible after his qualification a receiver or, if a receiver has not done so, the trustee shall give notice of the bankruptcy to every person known to be holding money or property subject to withdrawal or order of the bankrupt including every bank, building and loan association, public utility company, and landlord with whom the bankrupt has deposit, and to every insurance company which has issued a policy having a cash surrender value payable to the bankrupt. No notice need be given, however, to any of the forenamed persons who has knowledge or has previously been notified of the bankruptcy, and no notice need be given with respect to property exempt from execution.

Rule 810. Disposition of Appeal; Weight Accorded Referee's Findings

Upon an appeal the district court may affirm, modify, or reverse a referee's judgment or order, or remand with instructions for further proceedings. The court shall

accept the referee's findings of fact unless they are clearly erroneous, and shall give due regard to the opportunity of the referee to judge of the credibility of the witnesses.

Rule 610. Prosecution and Defense of Proceedings by Trustee or Receiver

The trustee or receiver may, with or without court approval, prosecute or enter his appearance and defend any pending action or proceeding by or against the bankrupt, or commence and prosecute any action or proceeding in behalf of the estate, before any tribunal.

Rule 903. Rule of Construction

These rules shall be construed to secure the expeditious and economical administration of every bankrupt estate and the just, speedy, and inexpensive determination of every proceeding in bankruptcy.

APPENDIX VIII

Rule 11-44. Petition as Automatic Stay of Actions Against Debtor and Lien Enforcement

(a) Stay of Actions and Lien Enforcement. A petition filed under Rule 11-6 or 11-7 shall operate as a stay of the commencement or the continuation of any court or other proceeding against the debtor, or the enforcement of any judgment against him, or of any act or the commencement or continuation of any court proceeding to enforce any lien against his property, or of any court proceeding, except a case pending under Chapter X of the Act, for the

purpose of the rehabilitation of the debtor or the liquidation of his estate.

(b) Duration of Stay. Except as it may be deemed annulled under subdivision (c) of this rule or may be terminated, annulled, modified, or conditioned by the bankruptcy court under subdivision (d), (e), or (f) of this rule, the stay shall continue until the case is closed, dismissed, or converted to bankruptcy or the property subject to the lien is, with the approval of the court, abandoned or transferred.

(c) Annulment of Stay. At the expiration of 30 days after the first date set for the first meeting of creditors, a stay provided by this rule other than a stay against lien enforcement shall be deemed annulled as against any creditor whose claim has not been listed in the schedules and who has not filed his claim by that time.

(d) Relief from Stay. Upon the filing of a complaint seeking relief from a stay provided by this rule, the bankruptcy court shall, subject to the provisions of subdivision (e) of this rule, set the trial for the earliest possible date, and it shall take precedence over all matters except older matters of the same character. The court may, for cause shown, terminate, annul, modify or condition such stay. A party seeking continuation of a stay against lien enforcement shall show that he is entitled thereto.

(e) Ex Parte Relief from Study. Upon the filing of a complaint seeking relief from a stay against any act or proceeding to enforce a lien or any proceeding commenced for the purpose of rehabilitation of the debtor or the liquidation of his estate, relief may be granted without

written or oral notice to the adverse party if (1) it clearly appears from specific facts shown by affidavit or by a verified complaint that immediate and irreparable injury, loss, or damage will result to the plaintiff before the adverse party or his attorney can be heard in opposition, and (2) the plaintiff's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. The party obtaining relief under this subdivision shall give written or oral notice thereof as soon as possible to the trustee, receiver, or debtor in possession and to the debtor and, in any event, shall forthwith mail to such person or persons a copy of the order granting relief. On 2 days' notice to the party who obtained relief from a stay provided by this rule without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its reinstatement, and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(f) Availability of Other Relief. Nothing in this rule precludes the issuance of, or relief from, any stay, restraining order, or injunction when otherwise authorized.

Rule 11-24. Notice to Parties in Interest and the United States.

(a) Ten-Day Notices to Parties in Interest. Except as provided hereinafter, the court shall give the trustee or receiver, the debtor, and all creditors, including secured creditors, at least 10 days' notice by mail of (1) a meeting of creditors; (2) any proposed sale of property, other than

in the ordinary course of business, including the time and place of any public sale, unless the court on cause shown shortens the time or orders a sale without notice; (3) the hearing on the approval of a compromise or settlement of a controversy, unless the court on cause shown directs that notice not be sent; (4) the time for filing objections to confirmation; (5) the hearing to consider confirmation of a plan; (6) the time fixed to reject a proposed modification of a plan when notice is required by Rule 11-39; and (7) the hearing on an application for allowances for compensation or reimbursement of expenses. The notice of a proposed sale of property, including real estate, is sufficient if it generally describes the property to be sold. The notice of a hearing on an application for compensation or reimbursement of expenses shall specify the applicant and the amount requested.

(b) Other Notices to Parties in Interest. Except as provided in subdivision (f) of this rule, the court shall give notice by mail to the trustee or receiver, the debtor, and all creditors, including secured creditors, of (1) dismissal of the case pursuant to Rule 11-42; (2) the time allowed for filing a complaint to determine the dischargeability of a debt pursuant to § 17c(2) of the Act as provided in Rule 11-48; and (3) entry of an order confirming a plan pursuant to Rule 11-38.

(c) Address of Notices. Bankruptcy Rule 203(e) applies in Chapter XI cases.

(d) Notices to Creditors' Committee. Copies of all notices required to be mailed to creditors under these rules shall be mailed to the creditors' committees elected pursuant to Rule 11-29, if any. Notwithstanding the forego-

ing subdivisions, if a creditors' committee has been selected, the court may order that notices required by clauses (2), (3), and (7) of subdivision (a) be mailed only to the committee or to its authorized agent and to the creditors who file with the court a request that all notices under these clauses be mailed to them.

(e) Notices to the United States. Copies of all notices required to be mailed to creditors under these rules shall be mailed to the United States in the manner provided in Bankruptcy Rule 203(g).

(f) Notice by Publication. Bankruptcy Rule 203(h) applies in Chapter XI cases.

(g) Caption. The caption of every notice given under this rule shall comply with Rule 11-9.

Rule 13-401. Petition as Automatic Stay of Actions Against Debtor and of Lien Enforcement

(a) Stay of Actions and Lien Enforcement. A petition filed under Rule 13-103 or Rule 13-104 shall operate as a stay of the commencement or continuation of any action against the debtor, or the enforcement of any judgment against him, or of any act or the commencement or continuation of any court proceeding to enforce any lien against his property, or of any court proceeding for the purpose of rehabilitation of the debtor or the liquidation of his estate.

(b) Duration of Stay. Except as it may be deemed annulled under subdivision (c) or may be terminated, annulled, modified, or conditioned by the bankruptcy court

under subdivision (d), (e) or (f) of this rule, the stay shall continue until the case is closed, dismissed, or converted to bankruptcy or the property subject to the lien is, with the approval of the court, abandoned or transferred.

(c) Annulment of Stay. At the expiration of 30 days after the first date set for the first meeting of creditors, the stay provided by this rule other than a stay against lien enforcement shall be deemed annulled as against any creditor whose claim has not been listed in the Chapter XIII Statement and who has not filed his claim by that time.

(d) Relief from Stay. On the filing of a complaint by a creditor who has timely filed his claim or who is secured by an estate in real property or chattels real seeking relief from a stay provided by this rule, the bankruptcy court shall, subject to the provisions of subdivision (e) of this rule, set the trial for the earliest possible date, and it shall take precedence over all matters except older matters of the same character. The court may, for cause shown, terminate, annul, modify, or condition such stay. A party seeking continuation of a stay against lien enforcement shall show that he is entitled thereto.

(e) Ex Parte Relief from Stay. Upon the filing of a complaint by a creditor who has timely filed his claim or who is secured by an estate in real property or chattels real seeking relief from a stay provided by this rule against any act or the commencement or continuation of any court proceeding to enforce any lien, or any proceeding for the purpose of rehabilitation of the debtor or liquidation of his estate, relief may be granted without written or oral notice to the trustee or the debtor if (1) it clearly appears

from specific facts shown by affidavit or by a verified complaint that immediate and irreparable injury, loss, or damage will result to the plaintiff before the trustee or the debtor can be heard in opposition, and (2) the plaintiff's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. The party obtaining relief under this subdivision shall give written or oral notice thereof as soon as possible to the trustee and to the debtor and, in any event, shall forthwith mail to such persons a copy of the order granting relief. On 2 days' notice to the party who obtained relief from a stay provided by this rule without notice, or on such shorter notice to that party as the court may prescribe, the trustee or the debtor may appear and move its reinstatement, and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(f) Availability of Other Relief. Nothing in this rule precludes the issuance of, or relief from, any stay, restraining order, or injunction when otherwise authorized.

APPENDIX IX

§ 89-1-55. How lands sold under mortgages and deeds in trust.

All lands comprising a single tract, and wholly described by the subdivisions of the governmental surveys, sold under mortgages and deeds of trust, shall be sold in the manner provided by section one hundred eleven of the constitution for the sale of lands in pursuance of a decree

of court, or under execution. All lands sold at public outcry under deeds of trust or other contracts shall be sold in the county in which the land is located, or in the county of the residence of the grantor, or one of the grantors in the trust deed, provided that where the land is situated in two or more counties, the parties may contract for a sale of the whole in any of the counties in which any part of the land lies. Sale of said lands shall be advertised for three consecutive weeks preceding such sale, in a newspaper published in the county, or, if none is so published, in some paper having a general circulation therein, and by posting one notice at the courthouse of the county where the land is situated, for said time, and such notice and advertisement shall disclose the name of the original mortgagor or mortgagors in said deed of trust or other contract. No sale of lands under a deed of trust or mortgage, shall be valid unless such sale shall have been advertised as herein provided for, regardless of any contract to the contrary. An error in the mode of sale such as makes the sale void will not be cured by any statute of limitations, except as to the ten-year statute of adverse possession.

§ 85-7-101. Articles constructed, manufactured, or repaired — lien for labor and materials.

All carriages, buggies, wagons, plows, or any article constructed, manufactured or repaired for any person, and at his instance, shall be liable for the price of the labor and material employed in constructing, manufacturing, or repairing the same; and the machanic to whom the price of said labor and material may be due shall have the right to retain possession of such things so constructed, manufactured, or repaired until the price be

paid; and if the same shall not be paid within thirty days, he may commence his suit in any court of competent jurisdiction, and, upon proof of the value of the labor and materials employed in such repairs, manufacture or construction, he shall be entitled to judgment against the party for whom such labor was done or materials furnished, with costs, as in other cases, and to a special order for the sale of the property retained in his possession for the payment thereof, with costs, and to an execution, as in other cases, for the residue of what remains unpaid after sale of the property.

§ 85-7-105. Remedy where lienholder loses possession to owner.

If the lienholders mentioned in sections 85-7-101 and 85-7-103 part with possession of the property, they shall retain their liens while the property remains in the hands of the owner, or one deriving title or possession through him, with notice that the price of the labor and materials or the price of feeding, grooming, training, grazing or keeping the same was unpaid, and may enforce the same in like manner as is provided in sections 85-7-31 and 85-7-53.

§ 85-7-131. Property subject to lien — effect as to purchasers, etc., without notice.

Every house, building, water well or structure of any kind, and any fixed machinery, gearing or other fixture that may or may not be used or connected therewith, railroad embankment, erected, constructed, altered, or repaired, and every subdivision of property or subdivided property which required services, designs or construction

in designing or laying out of streets or subdividing or construction of streets, sewerage, water or other utilities to be furnished by the said subdivision or by the various owners or holders or creators of said subdivision or subdivided property or individual lot or lots in connection therewith, whether inside of a municipality or outside thereof, shall be liable for the debt contracted and owing, for labor done or materials furnished, or architectural engineers and surveyors or contractors service rendered about the erection, construction, alteration, or repairs thereof; and debt for such services or construction shall be a lien thereon. The architects, engineers, surveyors, laborers, and materialman and/or contractors who rendered services and constructed the improvements shall have a lien therefor. If such house, building, structure, or fixture be in a city, town or village, the lien shall extend to and cover the entire lot of land on which it stands and the entire curtilage thereto belonging; or, if not in a city, town or village, the lien shall extend to and cover one (1) acre of land on which the same may stand, if there be so much, to be selected by the holder of the lien. If the structure be a water well, the lien shall extend only to all pumps, pipes, equiment therein and all water well appurtenances. If the structure be a railroad or railroad embankment, the lien shall extend to and cover the entire roadbed and right of way, depots and other buildings used or connected therewith. If the services of the architect, surveyor, engineer, laborers, materialmen or of the contractors shall be upon the whole subdivision, the lien shall extend to and cover the entire subdivision; but if a part only of the land is subdivided and laborers, materialmen, architects, surveyors or engineers services are required and contractors are employed, then the lien shall extend to only that portion of said property upon which the services were required or upon which or in con-

nection with which the work was done or the materials were furnished. Such lien shall take effect as to purchasers or encumbrancers for a valuable consideration without notice thereof, only from the time of commencing suit to enforce the lien, or from the time of filing the contract under which the lien arose, or notice thereof, in the office of the clerk of the chancery court, as hereinafter stated; delivery of material to the job is prima facie evidence of its use therein, and use of water from a water well is prima facie evidence of acceptability of well.

APPENDIX X

AMENDMENT V — CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Supreme Court, U. S.
FILED
JAN 18 1977
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Supreme Court of the United States

October Term, 1976

No. 76-763

CAMELIA BUILDERS, INC., E. J. YELVERTON, JR., FARNALE, INC., R. L. GOODALE and JEFFREY H. HUBBARD,

Petitioners,

against

FIDELITY MORTGAGE INVESTORS,

Respondent.

BRIEF FOR FIDELITY MORTGAGE INVESTORS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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MacLachlan, Bankruptcy 205 (1956) 16

Articles:

Murphy, Restraint and Reimbursement: The Secured Creditor in Reorganization and Arrangement Proceedings, 30 Bus. Law 15 (1974) 23
Mussman & Reisenfeld, Jurisdiction in Bankruptcy, 13 Law & Contemp. Prob. 88 (1948) 16
Countryman, Real Estate Liens in Business Rehabilitation Cases, 50 Am. Bankr. L. J. 303 (1976) 23

Supreme Court of the United States

October Term, 1976

No. 76-763

CAMELIA BUILDERS, INC., E. J. YELVERTON, JR., FARNALE, INC., R. L. GOODALE and JEFFREY H. HUBBARD,

Petitioners,

against

FIDELITY MORTGAGE INVESTORS,

Respondent.

BRIEF FOR FIDELITY MORTGAGE INVESTORS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions Below

Camelia Builders, Inc., E. J. Yelverton, Jr., Farnale, Inc., R. L. Goodale and Jeffrey H. Hubbard, the petitioners herein (hereinafter collectively "Petitioners"), seek the issuance of a writ of certiorari to the United States Court of Appeals for the Second Circuit (the "Second Circuit") from that court's judgment and opinion issued on Septem-

ber 3, 1976. Appendix* I at 1a-22a.** The judgment of the Second Circuit affirmed an order of the United States District Court for the Southern District of New York entered on January 15, 1976. Appendix III at 32a-35a. The district court order was entered pursuant to a memorandum opinion of the district judge, dated December 16, 1975 (Appendix III at 35a-39a), and was based on evidence submitted to the district court and a "Certificate of Facts Showing Contempt" (the "Certificate") entered by the bankruptcy judge on July 29, 1975. Appendix IV at 41a-46a. The bankruptcy judge's Certificate and his "Decision of Proceeding to Certify for Contempt," dated July 14, 1975 (Appendix IV at 46a-57a), were rendered after a two-day trial held before him on April 10-11, 1975.

Jurisdiction

Although Petitioners state that jurisdiction is invoked under 28 U.S.C. §1254(1), presumably they also invoke jurisdiction under Section 24c of the Bankruptcy Act (hereinafter the "Act"), 11 U.S.C. §47(c).

Questions Presented

1. Whether the court of appeals correctly held that a knowing and wilful violation of Rule 11-44 of the Rules of Bankruptcy Procedure, 415 U.S. 1033 (1974), constitutes civil contempt.

* All references to "Appendix" refer to the appendices annexed to the petition for writ of certiorari (the "Petition") submitted by Petitioners.

** The opinion of the Second Circuit reprinted in Appendix I does not contain the correction made in the court's *per curiam* decision of November 5, 1976, which denied Petitioners' petition for rehearing. That decision, correcting page 8a of Appendix I to the Petition, is reproduced in the Appendix hereto.

2. Whether the court of appeals correctly held that Petitioners' reliance on 28 U.S.C. §959 in commencing and continuing a plenary action against Fidelity Mortgage Investors ("FMI"), debtor-in-possession, was improper.

Statutes and Rules Involved

The statutes involved are 28 U.S.C. §959 and Sections 41a(1), 70a(5), and 311 of the Bankruptcy Act, 11 U.S.C. §69a(1), 110a(5), and 711, respectively. The Rules of Bankruptcy Procedure involved are Rules 920, 810, 752(a) and 11-44. The pertinent parts of these statutes and rules are reproduced in the appropriate portions of this brief, and, except for Section 70a(5) of the Act and Rule 752(a), are also reproduced in Appendices V, VII and VIII to the Petition.

Statement of the Case

Fidelity Mortgage Investors, as debtor-in-possession under Chapter XI of the Act, respondent herein, applied to the bankruptcy court on March 28, 1975, for an order (1) adjudging Camelia Builders, Inc. ("Camelia"), E. J. Yelverton, Jr., Farnale, Inc. ("Farnale"), R. L. Goodale and Jeffrey H. Hubbard in civil contempt or, in the alternative, certifying the facts of Petitioners' contumacious conduct to the district court; (2) temporarily restraining Petitioners from proceeding with an action against FMI in the United States District Court for the Southern District of Mississippi (the "Mississippi Action"); (3) requiring Petitioners, jointly and severally, to reimburse FMI for its actual costs, expenses, disbursements and attorneys' fees

necessarily incurred in defending the Mississippi Action and in obtaining the relief it sought in the bankruptcy court; and (4) granting FMI such other and further relief as was just.

A hearing on FMI's application was held in the bankruptcy court on April 10 and 11, 1975. On July 14, 1975, based upon the testimony adduced and the other evidence admitted, the bankruptcy judge held that Petitioners' commencement of the Mississippi Action to enforce their purported lien against property* of FMI constituted contempt. Appendix IV at 56a. Because he found Petitioners' contempt to be "grave," the bankruptcy judge also held that the authorized relief under Rule 920(a)(3) of the Rules of Bankruptcy Procedure was insufficient. Appendix IV at 49a. Accordingly, on July 29, 1975, pursuant to Section 41 of the Act, 11 U.S.C. §69, and Bankruptcy Rule 920(a)(4), the bankruptcy judge certified to the district court the facts adduced at the hearing before him on April 10-11, 1975, and, on the basis of the certified facts (the "Certificate"), directed Petitioners to show cause in the district court why they should not be adjudged guilty of civil contempt. Appendix IV at 39a-41a.

On August 19, 1975, the parties presented their arguments in the district court, based on the evidence adduced in the bankruptcy court. Neither Petitioners nor FMI offered any additional testimonial evidence, although Petitioners did offer additional documentary evidence.

* FMI was a construction lender which had made a construction loan to the developer of a condominium project in Jackson, Mississippi, and held as security for the loan a first deed of trust on the Mississippi project and the land on which it was to be built. Appendix IV at 43a. Camelia and Farnale have asserted mechanics' and materialmen's liens against the subject property. *Id.*

On December 16, 1975, the district court rendered an opinion adjudging Petitioners "guilty of contempt of court" and requiring them to pay to FMI the costs, including attorneys' fees, which it incurred in the Mississippi Action and in the prosecution of the contempt proceeding. The court further required Petitioners to effect the return of certain monies which FMI had deposited with the court clerk in the Mississippi Action. Appendix at 39a. An order incorporating the relief granted by the district court was entered on January 15, 1976. Appendix III at 32a-34a.

On January 27, 1976, Petitioners filed their notice of appeal with the district court. The appeal was argued before the Second Circuit on May 13, 1976. A decision was rendered on September 3, 1976, affirming the decision of the district court in all respects. Thereafter, Petitioners petitioned the Second Circuit for rehearing and rehearing *en banc*. The court denied both petitions on November 5, 1976. Appendix II at 30a-31a.

On December 6, 1976, Petitioners filed the Petition with the clerk of the Supreme Court of the United States.

Petitioners' commencement and continuation of the Mississippi Action in contravention of Rule 11-44 constituted the conduct which was the basis of the contempt proceeding. Petitioners commenced the Mississippi Action on March 25, 1975, almost two months after FMI filed its Chapter XI petition.* They had actual knowledge, at the time, of the pending Chapter XI case and the automatic stay provisions of Rule 11-44. Appendix IV at 44a-45a. Despite such knowledge, Petitioners wilfully and deliberately violated

* FMI filed its Chapter XI petition on January 30, 1975.

the stay provisions by proceeding with the Mississippi Action, thereby depriving FMI and its creditors of $75,964.33 which FMI was required to deposit with the Mississippi federal court and also causing FMI to incur unnecessary legal fees and related expenses.

All other material facts in the instant case are set forth in the Certificate (Appendix IV at 41a-46a) and in the opinion of the Second Circuit (Appendix I at 1a-29a).

Summary of Argument

I.A. The court of appeals properly affirmed the district court's civil contempt judgment against Petitioners. Upon the filing of FMI's Chapter XI petition, Rule 11-44 automatically stayed "the commencement or the continuation of any court or other proceeding against [FMI] . . . or to enforce any lien against [FMI's] property"—wherever located. *See* Section 311 of the Act, 11 U.S.C. §711. Petitioners' commencement of the Mississippi Action against FMI, with the avowed purpose of affecting FMI's property, a first deed of trust (mortgage) on real property, with actual knowledge of the pendency of the FMI Chapter XI case as well as the provisions of Rule 11-44, constituted civil contempt under Section 41a(1) of the Act, 11 U.S.C. §69 (a)(1), subjecting Petitioners to the sanctions of Rule 920.

FMI's first deed of trust was "property" within the meaning of the Act. "[T]he term 'property' has been construed most generously and an interest is not outside its reach because it is novel or contingent or because enjoyment must be postponed." *Segal* v. *Rochelle*, 382 U.S. 375, 379

(1966). "Certainly, [a mortgage] interest constitutes 'property' . . . as 'property' can constitute something other than fee ownership." *In re Westec Corp.*, 460 F.2d 1139, 1143 (5th Cir. 1972).

The automatic stay of suits contained in Rule 11-44 is clear and specific. Virtually identical automatic stays contained in Bankruptcy Rules 401 and 601 have been enforced by means of contempt proceedings. *In re Tallyn*, 2 Bankr. L.Rep. ¶65,617 (E.D.Va. 1975); *In re Young*, 1 Collier Bankruptcy Cases 145 (M.D. Fla. 1974).

Rule 11-44(e) provides for immediate *ex parte* relief from the automatic stay, upon an appropriate factual showing, in order to avoid hardship to any person. Petitioners admittedly sought no such relief.

The court of appeals properly affirmed the district court's application of Bankruptcy Rule 920 in holding Petitioners liable for civil contempt. Such a "purely remedial" judgment is "analogous to a tort judgment for damages caused by wrongful conduct." *Parker* v. *United States*, 153 F.2d 66, 70 (1st Cir. 1946).

I.B. The Mississippi Action did not arise out of an act of FMI, as debtor-in-possession, in carrying on its business, and, therefore, 28 U.S.C. §959 did not authorize Petitioners' suit against FMI. FMI was merely performing its statutory duty as debtor-in-possession when it foreclosed its deed of trust. 8 Collier, Bankruptcy ¶6.32 at 928-929 (14th rev. ed. 1975). To preserve or "to collect and liquidate the assets of a debtor is not to carry on its business in any proper sense of the term." *Austrian* v. *Williams*, 216 F.2d 278, 285 (2d Cir. 1954), *cert. denied*, 348 U.S. 953 (1955).

II. The decision of the Second Circuit here is in accord with the decisions of this Court and of the other circuits. *Mueller* v. *Nugent*, 184 U.S. 1, 14 (1902) ("the filing of the petition is a *caveat* to all the world, and in effect an attachment and injunction. . . ."); *In re Rubin*, 378 F.2d 104, 108 (3d Cir. 1967).

Argument

I.

The Decision Below Is Correct.

A. A Knowing and Wilful Violation of Chapter XI Rule 11-44 Constitutes Contempt.

1. The Automatic Stay of Suits in Rule 11-44 Is Clear and Specific.

Upon FMI's filing its Chapter XI petition under Rule 11-6, the automatic stay of actions against the debtor and stay of lien enforcement against the debtor's property contained in Rule 11-44 immediately became effective. Rule 11-44 provides, in pertinent part, as follows:

> *Rule 11-44. Petition as Automatic Stay of Actions Against Debtor and Lien Enforcement.*
>
> *(a) Stay of Actions and Lien Enforcement.* A petition filed under Rule 11-6 or 11-7 shall operate as a stay of the commencement or the continuation of any court or other proceeding against the debtor, or the enforcement of any judgment against him, or of any act or the commencement or continuation of any court proceeding to enforce any lien against his property, or of any

> court proceeding, except a case pending under Chapter X of the Act, for the purpose of the rehabilitation of the debtor or the liquidation of his estate.

The language of Rule 11-44(a) is clear and unequivocal. Thus, Petitioners' commencement of the Mississippi Action against FMI with full knowledge of the pendency of the FMI Chapter XI case was a direct violation of the provisions of Rule 11-44 and constituted contempt,* punishable under Bankruptcy Rule 920, made applicable to Chapter XI cases by Rule 11-63. Rule 920(a) provides, in pertinent part, as follows:

> *(2) Disposition by Referee upon Notice and Hearing.* Any other conduct prohibited by §41a of the Act** may be punished by the referee only after hearing on notice. The notice shall be in writing and shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the contempt charged and whether the contempt is criminal or civil or both. The notice may be given on the referee's own initiative or on motion by a party, by the United States attorney, or by an attorney appointed by the referee for that purpose. If the contempt charged involves disrespect to or criticism of the referee, he is disqualified from presiding at the hearing except with the consent of the person charged.

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* On March 18, 1974, this Court entered an order promulgating the Rules of Bankruptcy Procedure for Chapter XI cases and making them effective in all such cases "on July 1, 1974." 415 U.S. 1005 (1974). The bankruptcy court also entered an order on February 28, 1975, which, among other things, fixed a date for the first meeting of creditors in the FMI Chapter XI case, and noted that the Rule 11-44 automatic stay of suits was effective on January 30, 1975, the date on which FMI filed its Chapter XI petition.

** Section 41a(1) of the Act, 11 U.S.C. §69(a)(1), provides in relevant part that "[a] person shall not . . . disobey or resist any lawful order, process or writ."

(3) Limits on Punishment by Referee. A referee shall not order imprisonment nor impose a fine of more than $250 as punishment for any contempt, civil or criminal.

(4) Certification to District Judge. If it appears that conduct prohibited by §41a of the Act may warrant punishment by imprisonment or by a fine of more than $250, he may certify the facts to the district judge. On such certification the judge shall proceed as for a contempt not committed in his presence.

The courts have consistently enforced the contempt provisions of Section 41a(1). *See Mueller* v. *Nugent,* 184 U.S. 1 (1902); *In re Rubin,* 378 F.2d 104 (3d Cir. 1967); *Docteroff* v. *New York Credit Men's Adjustment Bureau,* 187 F.2d 4 (2d Cir. 1951); *In re American Associated Systems, Inc.,* 373 F.Supp. 977 (E.D. Ky. 1974); *In re Lawrence Carpet Co.,* 122 F.Supp. 912 (S.D.N.Y. 1954); *In re Sussman,* 85 F.Supp. 570 (S.D.N.Y. 1949); 1 Collier, Bankruptcy ¶¶2.57, 2.58 at 302.4-321 (14th rev. ed. 1974); 2A Collier, Bankruptcy ¶¶41.01, 41.03 at 1583, 1589 (14th rev. ed. 1974); *see also United States* v. *Ross,* 243 F.Supp. 496, 499 (S.D.N.Y. 1965) ("A 'civil contempt' is a litigant's failure to do something ordered to be done in a civil action for the benefit of the opposing party therein.").

The decision of the court of appeals here, which affirmed the district court's civil contempt judgment, is correct. The Second Circuit recognized the settled rule that in order to cite a party for contempt it must be established that (a) the alleged contemnor had knowledge of the order which he is said to have violated, (b) the order was specific and definite, and (c) the alleged contemnor violated the order.

In re Rubin, 378 F.2d 104, 108 (3d Cir. 1967) (cited with approval in the Petition at 17 and 21).

The court of appeals correctly found here that all three requirements were satisfied: (a) The evidence at the trial "amply documented knowledge on the part of [Petitioners] of FMI's Chapter XI petition and the consequent stay under Rule 11-44." Appendix I at 7a; (b) "It is difficult to conceive of a rule with a more apparent and certain meaning: After the Chapter XI petition has been filed, a debtor cannot be sued." Appendix I at 6a; and (c) "Rule 11-44 clearly required Camelia and Farnale to secure the permission of the New York bankruptcy court before filing an action against FMI in Mississippi." Appendix I at 21a-22a.

2. *The Bankruptcy Court Had Jurisdiction to Hold Petitioners in Civil Contempt*

Petitioners urge that the bankruptcy court lacked authority and jurisdiction to enter a civil contempt judgment for a violation of Rule 11-44. Petition at 7-12. They cite no applicable authority for this contention, however, for none exists.

In fact, courts have uniformly held that a violation of the injunctive provisions of the Rules of Bankruptcy Procedure, specifically Rules 401 and 601, does constitute contempt, subjecting the contemnor to the sanctions of Bankruptcy Rule 920. *See In re Tallyn,* 2 Bankr. L. Rep. ¶65,617 (E.D. Va. 1975); *In re Young,* 1 Collier Bankruptcy Cases

145 (M.D. Fla. 1974). Bankruptcy Rules 401 and 601* are, by their terms, the virtual equivalent of Rule 11-44. Thus, Petitioners' violation of the injunctive provisions of Rule 11-44** should, as the court of appeals correctly reasoned, subject them to the sanctions of a civil contempt judgment.

> Since Rule 11-44 has the effect of an order and was designed to expedite automatically the stay that would otherwise be obtained by an order,[2] it would be exalting form over substance to hold that a violation of Rule 11-44 is not punishable under §41(a) and Rule 920. . . .
>
> In short, . . . the contempt power of the courts under §41(a) and Rule 920 includes the authority to enforce the rules themselves via contempt orders.

2 For a discussion of court orders designed to stay subsequent proceedings against debtors-in-possession, see 1 Collier, *Bankruptcy,* 2.62 (14th ed. 1972). For the purposes of our opinion, the important point is that Rule 11-44 now makes the establishment of such stays automatic. In the absence of such automatic stays, the debtors-in-possession secured specific orders to the same effect. We see no reason to treat a stay explicitly granted by the court differently from a stay established by rule, at least with respect to the courts' enforcement powers via contempt.

Appendix I at 10a.

* Bankruptcy Rules 401 and 601 read in pertinent part as follows:

> *Rule 401.* . . . The filing of a petition shall operate as a stay of the commencement or continuation of any action against the bankrupt. . . .
>
> *Rule 601.* . . . The filing of a petition shall operate as a stay of any act or the commencement or continuation of any court proceeding to enforce . . . a lien against property in the custody of the bankruptcy court. . . .

** Rule 11-44 was promulgated pursuant to Section 2075, Title 28, United States Code, by *order* of the Supreme Court of the United States on March 18, 1974, and became effective on July 1, 1974. 415 U.S. 1033 (1974).

Petitioners rely on two inapposite cases in an attempt to limit the contempt powers of the bankruptcy and district courts. Both cases, *Wakefield* v. *Housel,* 288 F. 712 (8th Cir. 1923), and *Magen* v. *Campbell,* 186 F. 675 (3d Cir. 1911) (Petition at 9-10), involved *criminal* contempt convictions in contrast to the *civil* contempt judgment here. The courts in *Magen* and *Wakefield* objected to the denial to the alleged contemnors of the additional rights available to criminal defendants. Aside from being distinguishable on their facts, the legal reasoning in *Magen* and *Wakefield* is inapplicable here. Neither case involved a violation of the Rules of Bankruptcy Procedure and the automatic stay of lien enforcement provided for therein. Because the charge was criminal contempt in *Wakefield,* for which a person may be sentenced, as a punitive measure, to a definite term of imprisonment, the court held that the alleged contemnor was entitled to be charged with a "criminal act or acts with such clearness and certainty as to advise the accused of the charge which he had to meet and to give him a fair opportunity to prepare his defense." 288 F. at 717. In contrast, Petitioners have not claimed—and, indeed, cannot claim—that they were deprived of a fair opportunity to defend themselves.

Petitioners also argue that the bankruptcy court lacked jurisdiction because FMI's property, upon which Camelia and Farnale were attempting to enforce their asserted liens, was purportedly "in custodia legis of the State Court prior to the institution of the Chapter XI proceeding." Petition at 10-11. Petitioners, however, ignore Section 311 of the Bankruptcy Act, 11 U.S.C. §711, which gives the Chapter XI court "exclusive jurisdiction of the debtor and [its]

property, *wherever located.*" (Emphasis supplied.) As the Second Circuit stated here, "§311 deprived the Mississippi state court of the jurisdiction which it [had] exercised until [FMI filed its Chapter XI petition]." Appendix I at 11a. Thus, because Rule 11-44, which is based on the broad jurisdictional grant of Section 311, enjoins "the commencement or the *continuation* of any court or other proceeding against the debtor . . ." (emphasis supplied), FMI's filing of a Chapter XI petition stayed not only the commencement of the Mississippi Action, but also Petitioners' *continuing* their suit in the Mississippi state court,* commenced prior to the FMI Chapter XI case.

Although Petitioners contend that the "Second Circuit appears to have misconstrued the entire nature of the proceeding before them" (Petition at 11), it is Petitioners who misunderstand the applicable law. Petitioners mistakenly cite *Straton* v. *New*, 283 U.S. 318 (1931), which was decided before the passage of the Chandler Act in 1938, and which dealt with the bankruptcy court's powers in an ordinary bankruptcy case under Chapters I-VII of the Act. As the Court stated in *Straton*:

> The filing of the petition is an assertion of jurisdiction. . . . *This jurisdiction is exclusive within the field defined by the law, and is so far in rem that the estate is regarded as in custodia legis from the filing of the petition.* [Citation omitted.] It follows that liens cannot thereafter be obtained nor proceedings be had in other courts to reach the property, the

* In January of 1975, shortly before FMI filed its Chapter XI petition, Camelia and Farnale, as a joint venture, sued FMI in the Circuit Court of Rankin County, Mississippi, seeking (1) an order enforcing their purported lien, and (2) a monetary judgment against FMI. Appendix IV at 43a.

> district court having acquired the exclusive right to administer all property in the bankrupt's possession. [Citation omitted, emphasis supplied.]

283 U.S. at 321. The jurisdiction of the bankruptcy court in *Straton* was thus restricted to administering "all property *in the bankrupt's possession.*" 283 U.S. at 321 (emphasis supplied). In contrast, the Chapter XI court here, vested with the broader jurisdiction given it by Section 311, could stay Petitioners from proceeding against FMI and its property in Mississippi. *See generally* 8 Collier, Bankruptcy ¶3.01[1] at 146-7 (14th rev. ed. 1974).

Petitioners also misconstrue several other cases in their attempt to show that the Chapter XI court here had no jurisdiction to stay them from commencing the Mississippi Action. They misread *In re A. Roth Co.*, 125 F.2d 396 (7th Cir. 1942) (Petition at 12), which was not a contempt proceeding, but rather a lienholder's application to the bankruptcy court for leave to foreclose on a mortgage. The court in *Roth* specifically noted as follows:

> It has long been the practice that when one desires to make the trustee a party to a foreclosure suit, to first obtain permission from the Bankruptcy Court.

125 F.2d at 397. Thus, had the lienholder in *Roth* proceeded with a foreclosure action without seeking leave of the bankruptcy court, he would have been in contempt. The lienholder in *Roth*, however, unlike Petitioners, *did* seek relief from the bankruptcy court's stay of lien enforcement before proceeding in another court. 125 F.2d at 397-98. Although the court of appeals in *Roth* found the bankruptcy court's denial of leave to foreclose to be an abuse of discretion, the court never denied the necessity of applying to the

bankruptcy court for leave to foreclose. In fact, the court confirmed its belief in that requirement. *Id,* at 397.

Petitioners have similarly misread *Town of Agawam* v. *Connors,* 159 F.2d 360 (1st Cir.), *cert. denied,* 330 U.S. 845 (1947) (Petition at 12), which also did not involve a contempt proceeding. In *Agawam,* another ordinary bankruptcy case under Chapters I-VII of the Act, the court held that the bankruptcy court could not interfere with a state court action when *in rem* jurisdiction had attached more than four months prior to the filing of the bankruptcy petition. 159 F.2d at 363-64. Sueh facts do not appear here, for the Mississippi Action was commenced by Petitioners *after* the filing of FMI's Chapter XI petition.

Because *Agawam* was a bankruptcy case, and *not* a Chapter XI case, the bankruptcy court's jurisdiction there was based on property in the actual or constructive possession of the debtor at the date of bankruptcy. *See Ex parte Baldwin,* 291 U.S. 610, 615 (1934); Mussman & Riesenfeld, Jurisdiction in Bankruptcy, 13 Law & Contemp. Prob. 88, 92, 98 (1948); MacLachlan, Bankruptcy 205 (1956). In the Chapter XI case here, the bankruptcy court had the much broader jurisdiction over FMI's property "wherever located," pursuant to Section 311 of the Act. *In re Stockman Development Co.,* 447 F.2d 387, 390 (9th Cir. 1971); *Slenderella Systems of Berkeley, Inc.* v. *Pacific T&T Co.,* 286 F.2d 488, 489-90 (2d Cir. 1961). Furthermore, the bankrupt in *Agawam* did not have the broad protection of Rule 11-44. The stay given the bankrupt in *Agawam,* based on Section 11a of the Act, only protected it against certain actions on *unsecured* debts, whereas Rule 11-44 provides FMI with an

automatic stay of *all* suits against the debtor and its property, even if such property is not in its possession.

> Any act to enforce the lien, such as commencement of foreclosure, seizure of the property subject to the lien, or an attempt to sell the property even though seized prior to the filing of the petition would be violation of the automatic stay. It matters not that foreclosure proceedings were instituted prior to the filing of the Chapter XI petition, for Rule 11-44 includes "continuation of any court proceeding to enforce any lien against the debtor's property" within the broad scope of the stay.

8 Collier, Bankruptcy ¶3.22, at 261 (14th rev. ed. 1974).

Petitioners' reliance on *Mid-Jersey National Bank* v. *Fidelity Mortgage Investors,* 518 F.2d 640 (3d Cir. 1975), is also misplaced. *Mid-Jersey* involved FMI's deposit of money with the court *after* entry of judgment against FMI and *before* FMI filed its Chapter XI petition. As the Second Circuit noted, in *Mid-Jersey,* the deposit was "the *res* of a trust held by the district court. Since the deposit was not FMI's property, it was not within the jurisdiction of the bankruptcy court under §311 and, therefore, Rule 11-44 was held inapplicable to the appeal." Appendix I at 14a. Here, unlike *Mid-Jersey,* "FMI, as holder of a deed of trust, had a property interest . . . which gave the bankruptcy court jurisdiction under §311." Appendix I at 14a. In contrast to *Mid-Jersey,* no judgment had ever been rendered against FMI in either the Mississippi Action or the state court action, and no money of FMI had been deposited with the court prior to the commencement of the FMI Chapter XI case. Rather, FMI was forced to deposit the sum of $75,964.33 with the Mississippi federal court as a direct

result of Petitioners' conduct, *after* the FMI Chapter XI case was commenced.

In another attack on the jurisdiction of the bankruptcy court, Petitioners assert that FMI did not have a property interest involved in the Mississippi Action. Relying primarily on this Court's holding in *Segal* v. *Rochelle,* 382 U.S. 375 (1966), the court of appeals properly rejected Petitioners' argument and held that FMI's mortgage interest did "constitute 'property' within the meaning of the bankruptcy laws." Appendix I at 12a.

Petitioners rely upon *Brunn* v. *Wichser,* 75 F.2d 25 (3d Cir. 1934), to assert that FMI's first mortgage (characterized as a first deed of trust) on real property, which secured a loan in the principal amount of $1,600,000, is not "property" of the debtor,* and that, therefore, the bankruptcy court had no jurisdictional basis** on which to stay them from prosecuting the Mississippi Action. The applicable authorities, however, conclusively demonstrate that a mortgage is "property," and that it is a sufficient jurisdictional basis for a Chapter XI court to stay litigation in other courts.

Brunn, supra, a pre-Chandler Act case involving an extension of time to pay debts, was, in effect, overruled by this Court in *Segal* v. *Rochelle, supra,* by the Second Circuit in *In re Prudence-Bonds Corp.,* 77 F.2d 328, 330 (2d Cir.), *cert. denied,* 296 U.S. 584 (1935) (holding that mortgages

* In fact, FMI now has title to the real property in question by virtue of a foreclosure sale held on March 28, 1975.

** Rule 11-44 is broadly worded so as to stay suits "against the debtor" *or* its "property," thereby indicating that any suit against the debtor, regardless of whether it has any property, will be stayed.

are property of the debtor and actions affecting them may be stayed), and by the Fifth Circuit in *In re Westec Corp.,* 460 F.2d 1139 (5th Cir. 1972) (discussed *infra*).

In *Segal* v. *Rochelle,* this Court held that a loss-carryback tax refund of the bankrupt was property within the meaning of Section 70a(5) of the Act, 11 U.S.C. 110a(5), so that title thereto vested in the trustee in bankruptcy. In discussing the general concept of property, Mr. Justice Harlan stated for the Court as follows:

> Admittedly, in interpreting Sec. 70a(5), "[i]t is impossible to give any categorical definition to the word 'property,' nor can we attach to it in certain relations the limitations which would be attached to it in others." [Citations omitted.] Whether an item is classified as "property" by the Fifth Amendment's Just-Compensation Clause or for purposes of a state taxing statute cannot decide hard cases under the Bankruptcy Act, whose own purposes must ultimately govern.
>
> The main thrust of §70a(5) is to secure for creditors everything of value the bankrupt may possess in alienable or leviable form when he files his petition. *To this end the term "property" has been construed most generously and an interest is not outside its reach because it is novel or contingent or because enjoyment must be postponed.* [Emphasis supplied.]

382 U.S. at 379. Thus, FMI's first deed of trust (or mortgage), which represented at least a contingent interest in realty, must fall within the definition of property under the Act. In this case, FMI's mortgage portfolio is its most significant asset, and the one asset in which FMI's creditors have the greatest interest. To deprive FMI's creditors of the bankruptcy court's protection for such assets would be to subvert a major purpose of the Act: "to secure for

creditors everything of value the [debtor] may possess in alienable or leviable form when [it] files [its] petition." 382 U.S. at 379.

In *In re Westec Corp.*, 460 F.2d 1139 (5th Cir. 1972), a Chapter X case, the court held that the bankruptcy court had jurisdiction to set aside a local taxing authority's completed tax sale of certain property on which the debtor* held first and second mortgages. The court noted that Sections 111 and 148 of the Act, 11 U.S.C. §§511, 548, not only give the Chapter X court "exclusive control over all property of the debtor wherever located, but also establish an automatic stay without notice of any pending proceeding and the commencement of any further proceeding to enforce a lien against the debtor's property. . . ." 460 F.2d at 1142. Section 311 of the Act and Rule 11-44, applicable here, also give the Chapter XI court the identical powers conferred by Sections 111** and 148 of the Act in Chapter X cases. *See also* Bankr. R. 10-601.

The *Westec* court, relying in part upon *Segal* v. *Rochelle*, *supra*, concluded that a mortgage lien, even though subordinate to a statutory tax lien, was property subject to the jurisdiction of the bankruptcy court, reasoning as follows:

> The Trustee here, at the time of the foreclosure, held the first and second mortgage on the real estate in question. Certainly, this interest constitutes "property" within the meaning of Sections 111 and 148 of the Bankruptcy Act, as "property" can constitute something other than fee ownership. [Citations omitted.]

460 F.2d at 1143. After noting that the debtor in *Westec* had not filed a copy of the reorganization court's restraining order in the public records of the appropriate county, the court found that the taxing authority nevertheless had *knowledge* of the Chapter X case. 460 F.2d at 1141, 1143. Accordingly, the court held notice was not necessary, and found that the taxing authority was required to seek a modification of the restraining order if it wished to foreclose on its asserted lien. "[T]he technicalities of state law simply cannot take precedence over the restraining order issued by the Chapter X court." 460 F.2d at 1143.

. Petitioners here do not contest FMI's first deed of trust, nor do they deny that property of the debtor is within the "exclusive" jurisdiction of the Chapter XI court. Moreover, as the foregoing authorities conclusively demonstrate, FMI's first deed of trust was "property" within the meaning of the Act. Petitioners also do not dispute that by commencing the Mississippi Action, they were attempting to subordinate FMI's first lien to their asserted mechanics' and materialmen's lien against the subject property, which now belongs to FMI. Appendix IV at 44a, 48a. Accordingly, the bankruptcy court had jurisdiction to stay Petitioners from enforcing their asserted lien.*

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* After the debtor filed its Chapter X petition in *Westec*, a reorganization trustee took charge of its property. When FMI filed its petition, however, it continued in possession of its property as "debtor-in-possession." Sections 342, 343 of the Act, 11 U.S.C. §§742, 743.

** Like Section 311, Section 111 of the Act gives the Chapter X court "exclusive jurisdiction of the debtor and its property, wherever located."

* FMI does not concede the validity of the lien asserted by Petitioners. Even if the lien were valid, however, that fact would have no bearing on the issue of Petitioners' contempt.

3. Rule 11-44 Is Constitutional.

Mistakenly relying on *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969), *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), and *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601 (1975), Petitioners argue that Rule 11-44 is unconstitutional because it would deprive them of their right to possession of property without any remedy.

The automatic stay contained in Rule 11-44 does not deprive Petitioners of any substantive rights, nor does it leave them without remedies for any wrongs they believe FMI committed against them. Petitioners could have applied to the bankruptcy court as early as January 31, 1975, when they first became aware that FMI filed a Chapter XI petition (Appendix at 44a-45a), in order to obtain relief from the Rule 11-44 automatic stay or to pursue their claim in the bankruptcy court. Sections (d) and (e) of Rule 11-44 specifically provide for such relief. Section (d) gives priority to hearing applications for relief from the stay and further places the burden of proof on the party seeking continuation of the stay of lien enforcement. Thus, FMI would have to show, without delay, why the stay should be continued.

Section (e) of Rule 11-44 also permits *ex parte* relief from the stay if the claimant can demonstrate that "immediate and irreparable injury, loss or damage" would result before the opposing party could be heard. Petitioners chose not to pursue any of the available relief, but, on March 25, 1975, nearly two months after learning of the FMI Chapter XI case, commenced the Mississippi Action,

cavalierly disregarding the terms of Rule 11-44, of which they had actual knowledge. Appendix IV at 45a.

None of the cases cited by Petitioners is applicable here. *Sniadach, supra,* involved a challenge to a Wisconsin prejudgment wage garnishment procedure under which the defendant's salary was withheld without notice and without a prior hearing as to the probable validity of the claim. This Court characterized the garnishment as "a taking which may impose tremendous hardships on wage earners with families to support." 395 U.S. at 353. Petitioners have no such compelling argument here. On the contrary, Petitioners had *ex parte* relief which was immediately available to them in the bankruptcy court, but chose to take another course.

This Court in *Fuentes, supra,* similarly sought to protect individuals from state replevin laws which authorized summary seizure of goods on an *ex parte* application. In a four to three decision, the Court found that such a procedure violated the due process clause of the Fourteenth Amendment because the "statutes serve no . . . important governmental or general public interest." 407 U.S. at 557. Congress and this Court have determined, however, that the bankruptcy court's injunctive powers *do* serve an important general public interest. *Continental Illinois National Bank & Trust Co.* v. *Chicago, Rock Island & Pacific Ry.*, 294 U.S. 648 (1935); Murphy, Restraint and Reimbursement: The Secured Creditor in Reorganization and Arrangement Proceedings, 30 Bus. Law. 15, 19-22 (1974); Countryman, Real Estate Liens in Business Rehabilitation Cases, 50 Am. Bankr. L.J. 303 (1976). As the Court in

Fuentes noted, the "prejudgment replevin provisions work a deprivation of property without due process of law insofar as they deny the right to a prior opportunity to be heard before chattels are taken from their possessor. *Our holding, however, is a narrow one.*" 407 U.S. at 579 (emphasis supplied).

North Georgia Finishing, Inc. v. *DiChem, Inc., supra,* another non-bankruptcy case, involved an unconstitutional state prejudgment garnishment procedure, and is distinguishable on the same basis as *Sniadach* and *Fuentes, supra.* Moreover, the statute in *North Georgia Finishing* was far different from Rule 11-44 with all of its procedural safeguards, particularly section (e) which permits *ex parte* relief from the stay on a showing of "immediate and irreparable injury, loss or damage."

Petitioners thus had adequate relief available under Rule 11-44(d)-(e). As the court of appeals here correctly held:

> Rule 11-44 provides for an immediate hearing and relief from any hardship that an automatic stay might cause. In short, there is no constitutional infirmity in Rule 11-44 since that rule itself gives the creditors an immediate opportunity to have the stay lifted or modified and since the policy considerations requiring such initial stays are not insignificant.

Appendix I at 16a. Petitioners were aware of the terms of Rule 11-44, but commenced the Mississippi Action, regardless of the consequences. Their knowing refusal to take the proper steps to obtain relief is hardly a violation of their rights, as they contend.

4. Rule 920 Is Constitutional and Was Constitutionally Applied.

Petitioners set forth a baseless Fifth Amendment "double-jeopardy" argument. Petition at 33-36. Significantly, they do not cite a single case in support of their novel theory. Petitioners contend that their rights were violated because the bankruptcy court found that their contumacious conduct was so grave that it required stronger sanctions than the bankruptcy court could administer and, therefore, it certified the facts to the district court. The district court offered Petitioners the opportunity to present additional evidence. They did so, but made no request to submit additional testimonial evidence. As the court of appeals stated:

> When stripped to its essentials, Camelia and Farnale's claim is that due process is violated when a contemnor is given too many opportunities to present his side of the case. This is a rather novel theory of due process.

Appendix I at 17a. Based upon the bankruptcy court's certificate of facts and upon the additional evidence submitted by Petitioners, the district court held Petitioners in contempt, required them to cause the return to FMI of those funds deposited with the Mississippi federal court, and assessed Petitioners with FMI's costs and legal fees. Petitioners contend, however, that the provision of Rule 920 which provides for a certification of facts to the district court and the imposition of a penalty by the district court is prohibited by the double-jeopardy provision of the Fifth Amendment. If this argument were applied to criminal cases, every time a jury found a defendant guilty and a

judge imposed a sentence, the defendant would have a Fifth Amendment double-jeopardy argument.

Petitioners' argument that the district court erred in accepting the bankruptcy court's findings of fact, instead of conducting a trial *de novo* (Petition at 22-24), is similarly fallacious. Petitioners had a full, complete and fair trial in the bankruptcy court on April 10-11, 1975, in accordance with Rule 920(a)(2). Petitioners do not allege otherwise.

In his decision of July 29, 1975, the bankruptcy judge found that the punishment available to him under Rule 920(a)(3) was insufficient, in view of Petitioners' conduct. Appendix IV at 49a, 56a. Pursuant to Rule 920(a)(4), the bankruptcy judge certified his findings of fact to the district court which held that such facts constituted contempt and gave the appropriate restitution to FMI for the injuries it suffered as the result of Petitioners' conduct. As is evident from the decision of the district judge (Appendix III at 35a-39a), he analyzed the facts as set forth in the Certificate. Although the district judge found the facts not to be clearly erroneous, he drew his own conclusions from those facts and additional documentary evidence offered by Petitioners before he applied the law and determined that Petitioners were in civil contempt. Unlike the criminal contempt cases frequently cited by Petitioners, a civil contempt judgment such as the one here, is "somewhat analogous to a tort judgment for damages caused by wrongful conduct." *Parker* v. *United States,* 153 F.2d 66, 70 (1st Cir. 1946). The purpose of a contempt judgment is "purely remedial—to coerce obedience to a decree . . . or to compensate complainant for loss

caused by respondent's disobedience of such a decree." *Id.,* 153 F.2d at 70. *See also Maggio* v. *Zeitz,* 333 U.S. 56 (1948); *Oriel* v. *Russell,* 278 U.S. 358 (1929).

Bankruptcy Rule 810 provides that on appeals to the district court, "the court shall accept the referee's findings of fact unless they are clearly erroneous, and shall give due regard to the opportunity of the referee to judge the credibility of the witnesses." Logically, Rule 810 also should apply to a bankruptcy judge's certification of facts to the district court. Bankruptcy Rule 752(a), also dealing with findings of fact, has the same effect: "Findings of fact shall not be set aside unless clearly erroneous. . . ." Thus, the district court's acceptance of facts set forth in the Certificate was entirely proper.

In *In re Roark,* 28 F.Supp. 515, 518 (E.D. Ky. 1939), the court stated the general rule which is still applicable under the Rules of Bankruptcy Procedure:

> As to the ruling of the referee requiring the bankrupt and his wife to make restitution to the estate to the extent of $500, the applicable rule is that the court should not disturb the findings of the referee upon disputed issues of fact, "unless there is most cogent evidence of mistake and miscarriage of justice." Kowalsky v. American Employers Ins. Co., 6th Cir., 90 F.2d 476, 479. Realizing that the referee, having heard the witnesses in person, is in a much better position than the court to determine the credibility of witnesses and the truth as to disputed facts, I am unable to say that the action of the referee in this respect is clearly erroneous, and hence the petition for review is denied and the referee's order approved and confirmed in this respect.

Similarly, in *Mazer* v. *United States,* 298 F.2d 579, 581-82 (7th Cir. 1962), the court said:

> Initially appellant contends that the evidence does not support the findings of fact. The standard by which the referee's findings of fact are to be judged is whether they are clearly erroneous. [Citations omitted.]

See Allen v. *Lokey,* 307 F.2d 353, 354 (5th Cir. 1962) (Applying former General Order in Bankruptcy No. 47, from which Rule 810 is derived, the court held that it was unable to "set aside the referee's findings if they are not 'clearly erroneous.' ").

The Certificate of the bankruptcy judge was based upon the undisputed evidence and on Petitioners' own testimony. Thus, the court of appeals properly concluded that Rules 810 and 752(a) are applicable here, that the bankruptcy court's findings of fact were not clearly erroneous, and that Petitioners were guilty of civil contempt.

The court of appeals correctly distinguished its earlier decision* in *O'Hagen* v. *Blythe,* 354 F.2d 83 (2d Cir. 1965), on which Petitioners erroneously rely. Appendix I at 8a, and Petition at 23. *O'Hagen* involved a criminal, and *not* a civil contempt citation. It is not applicable here because it was decided prior to October 1, 1973, the effective date of the Bankruptcy Rules. Moreover, the *O'Hagen* decision was based on the premise that the bankruptcy court had *no* power to adjudge and punish anyone for contempt, a premise which has been superseded by Bankruptcy Rule 920. According to the court in *O'Hagen,*

* In fact, the Honorable J. Joseph Smith, Circuit Judge, who wrote the court's opinion, was on the panel that decided *O'Hagen.*

> There is, of course, the general principle of bankruptcy law that
>
> > "* * * the report of a referee * * * shall set forth his findings of fact and conclusions of law, and the [district] judge shall accept his findings of fact unless clearly erroneous. * *" [Citations omitted.]
>
> Punishment for contempt, following a certificate by a Referee, does not however, come within this rule. The Referee has no power to punish for contempt. [Citations omitted.]

354 F.2d at 84. Under Rule 920, however, the bankruptcy judge is now empowered to adjudge *and punish* civil contempt. Here, the bankruptcy judge merely found that Petitioners were guilty of contempt. Appendix IV at 56a. The *O'Hagen* case, therefore, is not applicable.

Moreover, the court in *O'Hagen* was not bound by the bankruptcy court's findings because the bankruptcy judge there had failed to make a factual determination as to one material element for the finding of contempt. 354 F.2d at 84-85. Petitioners make no such argument here, for they cannot.

Petitioners also cite *In re McIntosh,* 73 F.2d 908 (9th Cir. 1934) (Petition at 23), which like *O'Hagen, supra,* was a criminal contempt case decided long before Rules 920, 752(a) and 810 went into effect. Even in other criminal contempt cases, *McIntosh, supra,* has been restricted to its narrow facts. *See In re Timmerman,* 302 F.2d 663, 666 (7th Cir.) (Kiley, C.J., concurring), *cert. denied,* 371 U.S. 816 (1962). Because the burden of proof, procedures of prosecution and rights of the accused are considerably different in civil and criminal contempt cases, *Parker,*

supra, 153 F.2d at 70-71, *McIntosh,* like *O'Hagen, supra,* has no relevance here.

The Third Circuit has, in another contempt case, adopted the same procedure used here. In *In re Contemporary Apparel, Inc.,* 488 F.2d 794, 799 (3d Cir. 1973), the court remanded a civil contempt case, also under Section 41 of the Act, 11 U.S.C. §69, to the district court so that it might "reconsider the referee's certificate of facts showing contempt, and then provide whatever remedy it believes, in its sound judgment, is warranted."

Rules 11-44 and 920 are thus constitutional and were constitutionally applied here. The court of appeals properly held that Petitioners' knowing and wilful violation of Rule 11-44 constituted civil contempt for which appropriate remedial sanctions were applied.

5. Petitioner Hubbard Cannot Be Excused from the Consequences of His Acts.

Petitioner Hubbard seeks to avoid being penalized for his contemptuous conduct by relying on his status as counsel to Camelia and Farnale. He cites *In re Watts & Sachs,* 190 U.S. 1 (1903). But the *Watts* case, a criminal contempt case, is distinguishable from this civil contempt case because the alleged contemnors there were sentenced to imprisonment. Here, FMI only sought an order directing Petitioner Hubbard to discontinue the Mississippi Action, to restore to FMI those monies it was deprived of in the Mississippi Action, and to reimburse FMI for those costs which it had to incur as a result of his conduct. Because of the greater burden of proof in a criminal contempt case,

the Court in *Watts* found insufficient evidence to sustain the conviction. 190 U.S. at 35. The Court did not hold, however, that an attorney may be insulated from the court's contempt power.

Petitioner Hubbard also cites *Imbler* v. *Pachtman,* 424 U.S. 409 (1976), which was a civil rights action, decided under 42 U.S.C. §1983, and not a contempt case. The Court in *Imbler* held that a *public prosecutor* was immune from a suit for damages under 42 U.S.C. §1983, but did not even imply that the prosecutor would be immune from a contempt citation if he refused to obey a court order or rule. Hence, Petitioner Hubbard cannot rely on *Imbler* to insulate himself from liability.

Petitioner Hubbard's conduct undoubtedly interfered with and obstructed the bankruptcy court's administration of the debtor's estate. Specifically, Hubbard counselled his clients to violate the specific stay of Rule 11-44 rather than to seek a modification thereof under the prescribed procedure. The district court found Petitioner Hubbard "equally in contempt with the clients he counselled," (Appendix III at 38a) and cited with approval the language of the bankruptcy court opinion:

> "I think he played fast and loose with the Rules. . . .
>
> "This court is loathe to certify an attorney for contempt but if an attorney will not recognize and honor the obligation to obey the automatic stay provisions of the Rules, how could a layman be expected to do so."

B. Petitioners' Reliance on 28 U.S.C. §959 Is Misplaced.

1. FMI, as Debtor-in-Possession, Was Not Conducting Business Within the Meaning of 28 U.S.C. §959.

The court of appeals correctly concluded here that, based on the facts of this case, 28 U.S.C. §959 did not authorize Petitioners to commence the Mississippi Action. Although that provision permits suits against debtors-in-possession for their acts in carrying on their business, it was not applicable here because Petitioners were merely attempting to enhance their position as against other creditors of FMI.

28 U.S.C. §959 provides in pertinent part as follows:

> a. Trustees, receivers or managers of any property, including debtors-in-possession, may be sued, without leave of the court appointing them, *with respect to any of their acts or transactions in carrying on business connected with such property.* Such actions shall be subject to the general equity power of such court so far as the same may be necessary to the ends of justice, but this shall not deprive a litigant of his right to trial by jury. [Emphasis supplied.]

Section 959 was intended to create an exception to the general rule that law suits against receivers or trustees in bankruptcy could not be brought without leave of the court. *Vass* v. *Conron Bros. Co.*, 59 F.2d 969, 970 (2d Cir. 1932). The intended exception was a narrow one, however, limited only to those actions against receivers, trustees or debtors-in-possession which are directly related to acts or transactions of such fiduciaries in their carrying on of the business connected with the property entrusted to them. *In re*

Investors Funding Corp. of New York, et al., —— F.2d —— (2d Cir. Dec. 15, 1976) (No. 76-5019, Slip. Op. 983); *Austrian* v. *Williams*, 216 F.2d 278 (2d Cir. 1954), *cert. denied*, 348 U.S. 953 (1955); *Vass* v. *Conron Bros. Co.*, 59 F.2d 969 (2d Cir. 1932); *In re American Associated Systems, Inc.*, 373 F.Supp. 977 (E.D. Ky. 1974); *see also* 2 Collier, Bankruptcy ¶2.36 at 247-48 (14th rev. ed. 1975).

The allegations of Petitioners' complaint in the Mississippi Action did not relate to or arise from an act of the debtor-in-possession in carrying on the business of the debtor. Rather, Camelia and Farnale were attempting to subordinate FMI's deed of trust and to enforce a purported mechanics' lien on the subject property arising from work performed *before* the commencement of the Chapter XI case. Appendix IV at 44a.

The foregoing is confirmed by the relief sought in the Mississippi state court action begun by Camelia and Farnale against the debtor prior to the commencement of the FMI Chapter XI case. Before filing its Chapter XI petition, FMI had commenced preparations for nonjudicial foreclosure against the real property in Mississippi subject to its lien. In the two suits started by Camelia and Farnale in the state and federal courts, they sought (1) an order enforcing their purported mechanics' and materialmen's lien against the subject property; and (2) a monetary judgment against the debtor. Appendix IV at 43a. The striking similarity in relief sought by Petitioners in the two actions—one of which was started *prior* to FMI's filing its Chapter XI petition—undermines their contention that the Mississippi Action relates to an act or transaction of FMI,

as debtor-in-possession, which is a requirement of 28 U.S.C. §959. Thus, Petitioners sought the same relief against FMI, debtor-in-possession, as they did against FMI, debtor.

Assuming, *arguendo,* that the Mississippi Action relates to FMI's conduct as debtor-in-possession, the cases construing 28 U.S.C. §959 nevertheless demonstrate that FMI's conduct does not come within the purview of the subject statute. As stated by the court of appeals here:

> The evident purpose of §959 is to enable a debtor-in-possession to continue his business subsequent to the filing of a Chapter XI petition. If debtors-in-possession were immunized from all suits after filing Chapter XI petitions, it would be difficult, if not impossible, for them to remain in business. Suppliers would be less likely to provide merchandise, banks would be less likely to extend credit and workers would be less likely to undertake employment with a debtor-in-possession if they were foreclosed from suing the debtor for wages or other obligations incurred after the Chapter XI petition is filed.
>
> Hence, §959 makes debtors-in-possession suable for the routine occurrences which arrise [sic] from efforts to continue "carrying on business" after the Chapter XI petition is filed.
>
> However, §959 was not intended to serve as *carte blanche* for creditors seeking to sue debtors-in-possession in a forum of creditors' choosing.

Appendix I at 18a.

Thus, the authority conferred by 28 U.S.C. §959 upon third parties permits them to hold a debtor-in-possession accountable for torts which it commits in the furtherance of its business operations. It was not meant to foster in-

terference with the use, control, maintenance and operation of the debtor's property. *See In re American Associated Systems, Inc.,* 373 F.Supp. 977, 979 (E.D. Ky. 1974); *see also* 2 Collier, Bankruptcy ¶2.36 at 248 (14th rev. ed. 1975). Petitioners' belated allegation that FMI committed a tort (Petition at 31) is merely an afterthought. This allegation was first raised in the court of appeals and was never mentioned in either the Mississippi Action or in the other courts below. Furthermore, when a trustee or debtor-in-possession* does that which is necessary to maintain the assets of an estate for the benefit of its creditors, those acts cannot be grounds for the commencement of a plenary action under the 28 U.S.C. §959 exception. *In re Investors Funding Corp. of New York, et al.,* —— F.2d —— (2d Cir. Dec. 15, 1976) (No. 76-5019, Slip Op. 983); *Austrian* v. *Williams,* 216 F.2d 278 (2d Cir. 1954), *cert. denied,* 348 U.S. 953 (1955); *Vass* v. *Conron Bros. Co.,* 59 F.2d 969 (2d Cir. 1932); *In re American Associated Systems, Inc.,* 373 F. Supp. 977 (E.D. Ky. 1974); *Melvin* v. *Klein,* 266 N.Y.S. 2d 533 (Sup. Ct. 1965).

The Second Circuit recently discussed the scope of §959 in the *Investors Funding Corp.* case, *supra.* There, the court assumed that a pending plenary action outside of the reorganization court related "to a routine ongoing business activity of the reorganized estate," noting that if "the suit were not so related," it could affirm the district court's injunction "without further inquiry." *In re Investors Fund-*

* A debtor-in-possession has not only the "title and powers" of a trustee, but also the "rights, duties and remedies" of a trustee in bankruptcy. *In re J. R. Cianchette & Sons Corp.,* 198 F.Supp. 740, 742 (D. Me. 1961); *In re Martin Custom Tires Corp.,* 108 F.2d 172, 173 (2d Cir. 1939).

ing Corp., supra at 988. Despite its assumption, the court still affirmed the injunction against the plenary action, reasoning as follows:

> But the main purpose of the suit brought against the trustee here is to revamp or alter a substantial interest in property administered by the court, which must necessarily lead to embarrassment to the estate. *See Ex parte Baldwin,* 291 U.S. 610, 618 (1934) (Brandeis, J.). The suit is designed to revise the trustee's interest in an item of intangible property, a wrap-around mortgage, by "unwrapping" it, thereby changing not only the value of the res by a very substantial amount ($700,000), but also changing the trustee's performance of his servicing duties in the future. Damages for the act of the trustee in omitting to make the timely payment to Buffalo would be only incidental to the real relief sought in the state court suit, just as the damages sought for failure to maintain contractually mandated passenger service in *Ex parte Baldwin, supra,* were incidental to the forfeiture of the railroad right-of-way that was sought as a remedy for the breach of contract, *id.*

Id., Slip Op. at 988-89. The foregoing reasoning is directly applicable here. Petitioners sought in the Mississippi Action to subordinate FMI's security interest, despite the fact that such property was subject to the Chapter XI court's jurisdiction.

In *Vass* v. *Conron Bros. Co.*, 59 F.2d 969 (2d Cir. 1932), the bankrupt had operated a cold meat storage plant and had leased to Conron Bros. Co. a portion of the premises which the bankrupt had agreed to refrigerate. After the trustee in bankruptcy affirmed the bankrupt's lease, Conron alleged that the trustee had failed to refrigerate the premises properly, causing the goods to spoil. Conron then commenced an action in the state court in reliance upon 28 U.S.C. §125, the predecessor to Section 959, having mistakenly presumed that the trustee's assumption of the bankrupt's lease made him amenable to suit. The court rejected Conron's contention, however, and affirmed the bankruptcy court's order staying the prosecution of the state court action.

Holding that Conron's claim did not arise from an "act or transaction" of the trustee in carrying on the business of the bankrupt, the court set forth guidelines for determining what action may be taken by a trustee without exposing himself to suits under 28 U.S.C. §959:

> To "carry on the business" is, we should think, the same thing as to "continue" it under Section 2(5) of the Bankruptcy Act, 11 USCA §11(5); it must involve enough to require an order of court. [Citations omitted.] *Merely to hold matters in statu quo; to mark time as it were; to do only what is necessary to hold the assets intact; such activities do not seem to us to be a continuance of the business.* This was all that [the trustee] did. When he took over the refrigerating plant, he found a lessee in possession of a part of them, from which he could not eject it. His alternatives were to accept the reversion, cum onere, as he did, making himself liable on covenants; or to reject it, leaving the bankrupts reversioners pro tanto, and owners of a most inconvenient interest in a building otherwise his own. He did no more than avoid this absurd complication, which would surely have impeded the settlement of the estate, and the discharge of his duties. It seems plain that he was not carrying on business as [28 U.S.C. §959] uses that term. . . . [Emphasis supplied.]

59 F.2d at 971. Thus, a debtor-in-possession which merely holds "the assets intact" cannot be deemed to be continuing its business.

Here, FMI was also merely preserving the assets of the estate. FMI's borrower defaulted on a loan in excess of $1,000,000, which was secured by a first deed of trust. In order to preserve its asset, FMI had no alternative but to proceed against the collateral by commencing the trustee's sale. For FMI to have done otherwise would have been a breach of its fiduciary obligation as a debtor-in-possession to protect and preserve its assets for the benefit of its creditors, an obligation imposed upon a debtor-in-possession whether or not authorized to operate the business of the debtor. *See generally Gardner-Denver Co.* v. *C. J. Haslam, Inc.*, 325 F.2d 208 (2d Cir. 1963); *In re Roosevelt Lanes, Inc.*, 234 F.Supp. 842 (E.D.N.Y. 1964), *aff'd per curiam*, 342 F.2d 1000 (2d Cir. 1965); 8 Collier, Bankruptcy ¶6.32 at 928-29 (14th rev. ed. 1975).

Likewise, in *Austrian* v. *Williams*, 216 F.2d 278 (2d Cir. 1954), *cert. denied*, 348 U.S. 953 (1955), the Second Circuit reaffirmed its holding in *Vass, supra*, that the collection and liquidation of assets is not "carrying on business" within the meaning of 28 U.S.C. §959. In *Austrian*, the Chapter X reorganization trustees had commenced a plenary action in federal court against the debtor's former officers, directors and principal stockholders, charging them with various derelictions in their management of the debtor's affairs. A trial on the trustee's claim resulted in a dismissal, and the defendants thereafter asserted claims in the federal action against the trustees, alleging, *inter alia*, that by commencing the plenary action the trustees forfeited their

immunity from liability in any court where the controversy was heard. The court rejected the defendants' contentions, holding that the suit commenced by the trustees did not constitute "'carrying on the business of the debtor.'" 216 F.2d at 285. The court, through then Circuit Judge Harlan, cited *Vass* v. *Conron Bros. Co., supra*, stating: "Merely to attempt to collect and liquidate the assets of a debtor is not to carry on its business in any proper sense of the term." 216 F.2d at 285. Thus, FMI's foreclosure sale falls squarely within the holding of *Austrian*: both actions sought "to collect and liquidate the assets of [the] debtor" and did not constitute carrying on the debtor's business.*

In a case similar to the instant case, the trustee in *In re American Associated Systems, Inc.*, 373 F.Supp. 977 (E.D. Ky. 1974), sought to have certain persons adjudged in contempt because of their violation of a stay order entered in the pending bankruptcy case. The contemnors had commenced actions in the state court against the trustee in bankruptcy and the bankruptcy judge, among others, subsequent to the dismissal of previous actions which had been commenced by the trustee for the collection of certain amounts due on promissory notes allegedly held by the contemnors and owed to the bankrupt. Because the trustee was unsuccessful in the litigation on the promissory notes, the contemnors alleged in their actions that the trustee and bankruptcy judge were guilty of libel, slander, malicious prosecution and conspiracy. In the contempt proceeding,

* As set forth in Exhibit "A" annexed to FMI's Chapter XI petition, the debtor was "engaged in mortgage lending for construction and development of real estate, and in ownership and the attendant operations of ownership of real property." Appendix IV at 42a. Petitioners' suggestion that FMI's foreclosure constituted the carrying on of its business is as illogical as stating that a lessor of real property is in the business of dispossessing its tenants.

the contemnors alleged that their malicious prosecution actions did not involve the "title, possession, or control of the *res* but a tort committed by the trustee in operating the debtor's business." 373 F.Supp. at 978.

The court rejected the contentions of the contemnors and adjudged them in contempt, reasoning that a trustee has an "official responsibiilty" to collect and reduce to money the property of the estate, and that this duty has nothing to do with the conduct of the bankrupt's business.

> To this end, the trustee must institute necessary legal actions including those arising from contract. . . . "Rights of action arising upon the contracts or property of the bankrupt, not yet resolved into suit, pass to the trustee and he should assert them in the proper tribunal whenever necessary for the collection or preservation of the bankrupt estate." [Citations omitted.] Thus, the commencement of suit in state court for recovery of sums allegedly due the bankrupt was commanded by the statutory directive to liquidate the estate assets, and is not classifiable as "carrying on business" as contemplated by 28 U.S.C. 959(a).

373 F.Supp. at 978-79. Here, the right of FMI, as debtor-in-possession, to foreclose arose from the deed of trust between the debtor and its borrower. Thus, the courts below correctly determined that the commencement of the foreclosure by FMI was merely an enforcement of that right and, in foreclosing, FMI was merely fulfilling its duty to protect and preserve its assets for its creditors.

2. *Petitioners' Enforcement of a Lien on Property Does Not Come Within the Scope of Section 959.*

A debtor's mortgage or lien is a property interest subject to the jurisdiction of the bankruptcy court. *In re Westec Corp.*, 460 F.2d 1139 (5th Cir. 1972); *In re Prudence-Bonds Corp.*, 77 F.2d 328, 330 (2d Cir. 1935); *and see Segal* v. *Rochelle*, 382 U.S. 375, 379 (1966) (discussed in I.A.2., *supra*). Petitioners sought in the Mississippi Action to subordinate FMI's lien to their purported lien, and thus sought to enforce a lien on the property of FMI, as debtor-in-possession, property that was *in custodia legis*. Actions against property within the bankruptcy court's jurisdiction, however, are *not* permissible under 28 U.S.C. §959.* *See Field* v. *Kansas City Refining Co.*, 9 F.2d 213 (8th Cir.), *cert. denied*, 271 U.S. 676 (1925); *Field* v. *Kansas City Refining Co.*, 296 F. 800 (8th Cir.), *cert. denied*, 266 U.S. 618 (1924); *J. I. Case Plow Works* v. *Finks*, 81 F. 529 (5th Cir. 1897); *In re American Associated Systems, Inc.*, 373 F. Supp. 977 (E.D. Ky. 1974); *American Brake Shoe & Foundry Co.* v. *Interborough Rapid Transit Co.*, 10 F.Supp. 512 (S.D.N.Y.), *aff'd per curiam*, 76 F.2d 1002 (2d Cir.), *cert. denied*, 295 U.S. 760 (1935); *Dickinson* v. *Willis*, 239 F. 171 (S.D. Iowa 1916); *Love* v. *Louisville & E.R. Co.*, 178 F. 507 (W.D. Ky. 1910).

In *American Brake Shoe & Foundry Co.* v. *Interborough Rapid Transit Co.*, 10 F.Supp. 512 (S.D.N.Y.), *aff'd per curiam*, 76 F.2d 1002 (2d Cir.), *cert. denied*, 295 U.S. 760

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* In fact, Rule 11-61(a)(2) of the Rules of Bankruptcy Procedure expressly provides that a proceeding to "determine the validity, priority, or extent of a lien or other interest in property" is an "adversary proceeding" governed by "Part VII of the Bankruptcy Rules."

(1935), the court held that the predecessor to 28 U.S.C. §959 did not contemplate the allowance of suits, such as the Mississippi Action, intended to establish liens or possessory rights in the *res* subject to the bankruptcy court's jurisdiction.

> As uniformly interpreted by the courts, . . . [the] sole purpose [of 28 U.S.C. §959] is to make federal receivers amenable to state court suits on causes of action arising out of the ordinary operation of the company in receivership. Actions for personal injuries caused by the negligent operation of a common carrier are a familiar example. Gableman v. Peoria, Decatur and Evansville R.R. Co., 179 U.S. 335, 21 S.Ct. 171, 45 L. Ed 220 (1900). On the other hand, causes directly affecting the administration of the receivership res, or property rights therein, do not fall within the provision; *to allow such suits to be instituted without leave of the court which has the property in its custody would divest it of its exclusive jurisdiction thereover and lead but to conflict and confusion in administration.* Such was not the legislative purpose. [Emphasis supplied.]

10 F.Supp. at 518.

None of the authorities cited by Petitioners supports their reliance on Section 959. The Mississippi and Texas state court cases cited by Petitioners have no relevance to the issues in this case. *In re Liebig,* 255 F. 459 (2d Cir. 1918) (Petition at 29), and *In re Commonwealth Bond Corp.,* 77 F.2d 308 (2d Cir. 1935) (Petition at 31), were, in any event, necessarily superseded by the Second Circuit's decision in this case and in *Austrian* v. *Williams, supra.*

Liebig, supra, was a reclamation action commenced *in the bankruptcy court* in order to recover a fraudulent purchase of eggs by the bankrupt. A direct contractual relationship existed between the parties there, but no contractual relationship existed between FMI and Camelia and Farnale. In sum, *Liebig* bears no relationship to any issue before this Court.

In re Commonwealth Bond Corp., supra, involved property held in trust by the debtor for another person. It was not, therefore, property of the debtor and, accordingly, not subject to the bankruptcy court's exclusive jurisdiction. The excerpt from *Commonwealth Bond Corp.* that Petitioners have taken out of context (Petition at 31) takes on a different meaning when read in context with the sentences preceding and following it:

> But the [injunctive] power so exercised was necessarily founded upon the possibility of bringing the security, suits against which were enjoined, within a plan of reorganization. . . . Since property held by the debtor as fiduciary cannot be included [within a plan of reorganization], suits confined to its administration may not be stayed.

77 F.2d at 309-10. In contrast, FMI had absolute ownership of the deed of trust here and did not hold it as a fiduciary. Petitioners commenced the Mississippi Action not against any property held in trust by FMI for some third party, but against FMI and its property. FMI's deed of trust, and the real property securing it, can and will be brought within FMI's Chapter XI plan.

The remaining authorities relied on by Petitioners are equally inapposite. *Diners Club, Inc.* v. *Bumb,* 421 F.2d 396 (9th Cir. 1970), and *Novo Enzyme Corp.* v. *Baker,* 361 F. Supp. 337 (S.D.N.Y. 1973), shed no light on the issues in

this case. The reorganization trustees in those cases were sued in state courts for breach of contracts which they had made. No such facts are present here. FMI, as debtor-in-possession, never entered into or assumed any contracts with Petitioners.

The foregoing authorities confirm that the commencement of the Mississippi Action by Petitioners violated the stay provisions of Rule 11-44, and that such conduct did not fall within the specific exceptions set forth in 28 U.S.C. §959.

3. *Asserted Good Faith Does Not Excuse Disobedience of the Automatic Stay of Rule 11-44.*

Petitioners' mistaken reliance on 28 U.S.C. §959 in commencing the Mississippi Action does not excuse or mitigate their deliberate disobediance of Rule 11-44.

In *In re American Associated Systems, Inc., supra,* the contemnors conceded that they had commenced their state court action with full knowledge of the bankruptcy court's stay order but, like Petitioners here, erroneously relied on 28 U.S.C. §959, arguing that the stay did not prohibit them from commencing the action. In finding contempt, the court held that 28 U.S.C. §959 was inapplicable, and that, accordingly, the "commencement of [the] state court actions against the trustee was a direct violation of the . . . [stay] order." 373 F.Supp at 979.

The court in *American Associated Systems* recognized that the contemnors' conduct may have been in good faith but that their actions still constituted contempt of court, reasoning as follows:

> It is equally apparent that the deliberate disobedience by respondents . . . is not mitigated by their subjective legal conclusions. Unlike its criminal counterpart, *civil contempt is " 'wholly remedial,' serves only the purpose of a party litigant, and is intended to coerce compliance with an order of the court or to compensate for losses or damages caused by non-compliance."* [Citations omitted.] [T]he good faith underlying the respondents' determination to sue in the Kentucky court does not diminish their culpability. [Emphasis supplied.]

373 F.Supp. at 979. Thus, the intentions of the Petitioners in doing the prohibited act are of no consequence if the act is in contravention of the court's order. *See McComb* v. *Jacksonville Paper Co.,* 336 U.S. 187, 191 (1949); *NLRB* v. *Local 282,* 428 F.2d 994, 1000-01 (2d Cir. 1970) ("a violation need not be wilful for a party to be found in civil contempt."); *NLRB* v. *Ralph Printing & Lithographing C.,* 433 F.2d 1058, 1062 (8th Cir. 1970), *cert. denied,* 401 U.S. 925 (1971); *United States* v. *Ross,* 243 F.Supp. 496, 499 (S.D.N.Y. 1965) ("In civil contempt proceedings the question is not one of intent but whether the alleged contemnors have complied with the court's order.").

Furthermore, Petitioners' purported reliance on Mississippi law in an attempt to demonstrate the substantive validity of their asserted mechanics' and materialmen's lien is irrelevant to the contempt citation here. As the Second Circuit correctly held:

> The issue here is a procedural one: whether Camelia and Farnale should have secured permission from the New York bankruptcy court before proceeding with their action in Mississippi. . . . That Camelia and

> Farnale may have a valid substantive position under Mississippi law does not mitigate, excuse or justify their willful procedural violation of the federal bankruptcy rules.

Appendix I at 20a-21a. *See Oriel* v. *Russell,* 278 U.S. 358, 363 (1929); 1 Collier, Bankruptcy ¶2.58 at 315 (14th rev. ed. 1974).

Thus, the Second Circuit properly affirmed the judgment of the district court which held that Petitioners' wilful and deliberate violation of the stay provisions of Rule 11-44 "only indicates . . . a contemptuous attitude to Rules which have the sanction of the Supreme Court and of the Congress of the United States." Appendix III at 38a.

II.

No Reason Exists for the Issuance of a Writ of Certiorari.

The considerations governing review on certiorari, set forth in this Court's Rule 19.1(b), though not limiting the discretion of the Court, do support a denial of certiorari here. No conflict exists between the Second Circuit's decision and decisions of this Court or of other courts of appeals. As shown in I., *supra,* the decision of the court of appeals was based on well-established principles of law.

Petitioners have also failed to cite any applicable cases in support of their purported constitutional and jurisdictional arguments. The Second Circuit's decision deals with no important question of federal law which has not been, but should be, settled by this Court, and Petitioners make no such contention.

Three courts have examined the facts herein,* and each has determined that those facts conclusively demonstrate that Petitioners had knowledge of "FMI's Chapter XI petition in New York almost immediately after it was filed" and of the automatic stay provisions of Rule 11-44, yet they wilfully violated the procedures established by the Rules of Bankruptcy Procedure. Appendix I at 20a. As Mr. Justice Holmes wrote in *United States* v. *Johnston,* 268 U.S. 220, 227 (1925):

> We do not grant a certiorari to review evidence and discuss specific facts.

That the Second Circuit and the district court here did not depart from the accepted and usual course of judicial proceedings is demonstrated by the denial of Petitioners' motions for rehearing and rehearing *en banc* by the court of appeals. Appendix II at 30a-31a.

Finally, there is no conflict among the circuits or with this Court on the issues presented. For clarity, the purported conflicts, as set forth in Point 3 of the Petition, pages 13-15, between the Second Circuit's decision and decisions of this Court and of other circuits are analyzed seriatim:

1. *Straton* v. *New,* 283 U.S. 318 (1931), does not hold that a state court action instituted prior to the commencement of a Chapter XI case preempts subsequent assumption of jurisdiction by a bankruptcy court. *Straton,* decided before the passage of the Chandler Act in 1938, dealt with

* Petitioners' allegation (Petition, Point 8, at 32-33) that James Young, an attorney who represented FMI in the Mississippi Action, has a conflict of interest is patently false and not worthy of reply.

the bankruptcy court's jurisdiction in an ordinary bankruptcy case under Chapters I-VII of the Act. That jurisdiction is limited to property in the bankrupt's "actual or constructive possession." *Thompson* v. *Magnolia Petroleum Co.*, 309 U.S. 478, 481 (1940). Under Section 311 of the Act, however, the Chapter XI court has "exclusive jurisdiction" of the debtor's property "wherever located." *See In re Freed & Co.*, 534 F.2d 1235, 1239 (6th Cir. 1976). Additionally, the Court in *Straton* was careful to state that "the action in the state court was merely in the nature of an execution or proceeding to obtain the avails of the judgment lien. . . ." 283 U.S. at 327. The creditors in *Straton* had gotten judicial liens sixteen months prior to bankruptcy. Petitioners' action in the Mississippi state court, however, was commenced within a month before the filing of FMI's Chapter XI case, had not proceeded to judgment, and no receiver had been appointed therein.

2. Neither this Court's decision in *Maggio* v. *Zeitz*, 333 U.S. 56 (1948), nor the Third Circuit's decision in *In re Rubin*, 378 F.2d 107 (3d Cir. 1967), held that all property issues must be disposed of prior to institution of contempt proceedings. In *Maggio*, this Court held that the bankruptcy court must determine whether a party is able to comply with a turnover order before adjudging that party in contempt for failing to comply. No such issue exists here. The only property issue, whether FMI's deed of trust constituted property of the debtor, was decided in the affirmative by the courts below.

The property question in *Rubin* was whether particular delivery routes were property of the debtor and, accordingly, whether persons were restrained from interfering with those delivery routes. The courts here did deal with the issue of whether FMI's deed of trust constituted property of the debtor protected by the automatic stay of lien enforcement in Rule 11-44. Thus, the decision below is not in conflict with either *Maggio* or *Rubin*.

3. Neither *Magen* v. *Campbell*, 186 F. 675 (3d Cir. 1911), nor *Wakefield* v. *Housel*, 288 F. 712 (8th Cir. 1923), held that contempt proceedings are prohibited under Section 41a of the Act for violation of the injunctive provisions of the Rules of Bankruptcy Procedure. In *Magen*, the alleged contemnor had been charged with refusing to be examined according to law. The Third Circuit held that the facts showed that the charge should have been perjury. Because the contempt proceedings had been summary, and a perjury charge would entitle the alleged contemnors to all the rights of a criminal defendant, the court reversed, but stated that had the charge of refusal to be examined been correct, the judgment under review might have stood.

Similarly, the Eighth Circuit in *Wakefield*, a *criminal* contempt case, reversed the judgment of the district court because the proceedings afforded the alleged contemnor had been *civil* in nature, thus depriving the alleged contemnor of his rights. Certainly neither case conflicts with the Second Circuit's decision here.

4. *In re A. Roth Co.*, 125 F.2d 396 (7th Cir. 1942); *Town of Agawam* v. *Connors*, 159 F.2d 360 (1st Cir.), *cert. denied*, 330 U.S. 845 (1947); *Brunn* v. *Wichser*, 75 F.2d 25 (3d Cir. 1934); and *In re Stanndco Developers, Inc.*, 534 F.2d 1050 (2d Cir. 1976), all cited by Petitioners, do not hold that Rule 11-44 is inapplicable in the case of competing lien

claimants. Indeed, the competing lienholder in *Roth* knowing that she was stayed from any foreclosure action that would affect the bankrupt's property, applied to the bankruptcy court for authority to commence her foreclosure action. The Seventh Circuit in *Roth* merely held that the bankruptcy court should have granted the competing lienholder leave to foreclose. Contrary to Petitioners' interpretation of *Roth*, the court there acknowledged the bankruptcy court's jurisdiction over the bankrupt's property, a junior mortgage, and the need for a competing lienholder to apply to the bankruptcy court if it wished to foreclose on real property in which the bankrupt had a mortgage interest.

Agawam and *Brunn* were not Chapter XI or Chapter X cases. In neither case did the court have jurisdiction of the debtor's property "wherever located," as did the Chapter XI court here. Thus, neither case conflicts with the Second Circuit's decision.

Stanndco, supra, like *Roth, Agawam,* and *Brunn,* is not a contempt case. The Second Circuit in *Stanndco,* a Chapter X case, did not hold that the bankruptcy court had no jurisdiction to stay suits against the debtor and its property, but merely modified the stay of suits to permit a foreclosure action to proceed against the debtor's "surety without any concurrent personal judgment taken against the debtor or trustee." 534 F.2d at 1054. Thus, *Stanndco* is easily reconciled with the instant case. Petitioners' statement that the bankruptcy court has no jurisdiction to restrain state court proceedings seeking to enforce liens on property *not* belonging to the debtor has no relevance here

because the Second Circuit held that Petitioners had sought to enforce a lien on property which *did* belong to FMI. Indeed, the court in *Stanndco* recognized that a reorganization court may stay a suit which has "as its immediate objective a judgment against the debtor, or interference with property of the debtor which is under the reorganization court's jurisdiction." 534 F.2d at 1052.

5. Contrary to Petitioners' suggestion, the Second Circuit's holding that Camelia and Farnale were required to secure a modification of the Rule 11-44 automatic stay of lien enforcement before commencing or continuing their action against FMI is not in conflict with *Perry* v. *Wood,* 63 F.2d 257 (5th Cir. 1933); *In re Grissler,* 136 F. 754 (2d Cir. 1905); *Hicks* v. *Knost,* 178 U.S. 541 (1900); *Taylor* v. *Carryl,* 61 U.S. 589 (1858); or *In re Willax,* 93 F.2d 293 (2d Cir. 1937).

Willax and *Grissler, supra,* are earlier Second Circuit decisions and, therefore, present no conflict between circuits. Neither is *Perry* v. *Wood, supra,* in conflict with the Second Circuit's holding here. In *Perry,* the bankrupt and a lienholder each had claims against a sum of money which was deposited with the clerk of a state court prior to the filing of an *involuntary petition in bankruptcy* under Chapters I-VII of the Act against the bankrupt. Because the jurisdiction of the bankruptcy court was limited to property within the bankrupt's possession, it could not stay the prebankruptcy court proceedings. In contrast, FMI's property here was only required to be deposited with the Mississippi federal court pursuant to court order *after* the commencement of FMI's Chapter XI case.

Hicks v. *Knost, supra,* held that a trustee cannot bring an action in the bankruptcy court for *in personam* relief against a third party asserting an adverse claim of ownership to the subject property without the adverse claimant's consent. Thus, the issue in *Hicks* v. *Knost* was not before the court of appeals here. Neither *Hicks* v. *Knost* nor *Taylor* v. *Carryl, supra,* which is not a bankruptcy case, dealt with a Chapter XI court's jurisdiction to *stay* actions against the debtor and its property. Hence, their holdings do not conflict with that of the Second Circuit here. In fact, if Petitioners had read *White* v. *Schloerb,* 178 U.S. 542 (1900), which was decided by this Court immediately after *Hicks, supra,* they would have seen that the Court was "of opinion that the judge of the court of bankruptcy was authorized to compel persons who had forcibly and unlawfully seized and taken out of the judicial custody of that court property which had lawfully come into its possession as part of the bankrupt's property, to restore that property to its custody; and therefore . . . 'the district court sitting in bankruptcy had jurisdiction by summary proceedings to compel the return of the property seized.' " 178 U.S. at 548. The district court here has done precisely what the district court was authorized to do in *White* v. *Schloerb*: it required Petitioners to return to FMI its funds wrongfully taken after the filing of the Chapter XI petition.

6. As in *Perry* v. *Wood, supra,* the court in *Mid-Jersey National Bank* v. *Fidelity Mortgage Investors,* 518 F.2d 640 (3d Cir. 1975), held that funds deposited with a court prior to the filing of the Chapter XI petition were not property of the debtor. Therefore, the court held that Rule 11-44 was not applicable. The Second Circuit considered

the holding of *Mid-Jersey* (Appendix I at 13a-14a) and noted that "here, unlike the situation in [*Mid-Jersey*], there is a property interest of FMI's existing at the date of institution of the Chapter XI proceeding which gives the bankruptcy court jurisdiction and which therefore makes Rule 11-44 applicable." Accordingly, there is no conflict between the Second and Third Circuits.

7. *In re McIntosh,* 73 F.2d 908 (9th Cir. 1934), was a criminal contempt case decided long before the effective date of Rule 920. Because *McIntosh* involved criminal contempt, the court limited its findings to such cases. 73 F.2d at 910. Thus, the Second Circuit's holding here is not in conflict with the Ninth Circuit's holding in *McIntosh.*

8. Finally, neither *In re Watts & Sachs,* 190 U.S. 1 (1903), nor *Imbler* v. *Pachtman,* 424 U.S. 409 (1976), is in conflict with the Second Circuit's holding. *Watts* was a criminal contempt case in which the contemnors were sentenced to imprisoment; there existed no restraining order, injunction or rule which had been violated by the alleged contemnors. Additionally, there was a conflict of evidence in *Watts* that does not exist here. The Court merely found that "there was no legal evidence to sustain this conviction for contempt. . . ." 190 U.S. at 35.

Imbler, supra, was not a contempt case, but rather a civil rights action. The Court concluded there that a public prosecutor was immune from a suit for damages under 42 U.S.C. §1983. It did not hold that a public prosecutor or an attorney was insulated from civil contempt liability for a wilful violation of an order or rule of the court.

The foregoing discussion confirms that the court of appeals decision here is not in conflict with any decisions of this Court or of any other court of appeals. Moreover, there was no departure in this case from existing law, and there is no important question of federal law which has not been, but should be, settled by this Court. Accordingly, this Court should not grant certiorari.

Conclusion

For the reasons stated, the petition for a writ of certiorari to the Court of Appeals for the Second Circuit should be denied.

Dated: New York, New York
January 13, 1977

Respectfully submitted,

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APPENDIX

Decision of the United States Court of Appeals for the Second Circuit on Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1028 — September Term, 1975

(Argued May 13, 1976 Decided September 3, 1976)

Decision-Petition for Rehearing
November 5, 1976

Docket No. 76-5007

IN RE:

FIDELITY MORTGAGE INVESTORS,

Debtor,

FIDELITY MORTGAGE INVESTORS,

Applicant-Appellee,

v.

CAMELIA BUILDERS, INC., E. J. YELVERTON, JR., FARNALE, INC., R. L. GOODALE and JEFFREY H. HUBBARD,

Respondents-Appellants.

Before: SMITH, MANSFIELD and VAN GRAAFEILAND,

Circuit Judges.

ON REHEARING

PER CURIAM:

The petition for rehearing is denied. The opinion is corrected by striking the period on page 5390 of the slip opinion, line 27, inserting a semicolon, and striking the

language from "Rule 602(a) . . ." on line 27 to and including "Moreover," on line 31, so that the paragraph will read:

> "There is no merit to this position; as the *Rubin* decision makes clear, a person is in contempt of court if he knowingly violates a court order, whether or not he received a formal notice. The cases do not require that the contemnors have received formal notice if they have actual knowledge of the order. Hence, the issue of formal notice is irrelevant to Camelia and Farnale's contempt since it is clear that they, in fact, did know of the stay which they ignored."

/s/ J. Joseph Smith

J. Joseph Smith

/s/ Walter R. Mansfield

Walter R. Mansfield

/s/ Ellsworth A. Van Graafeiland

Ellsworth A. Van Graafeiland

Circuit Judges.

Supreme Court, U. S.
FILED
FEB 7 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-763

CAMELIA BUILDERS, INC., ET AL,
Petitioners,

versus

FIDELITY MORTGAGE INVESTORS,
Respondent.

PETITIONERS REPLY TO BRIEF FOR FIDELITY MORTGAGE INVESTORS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
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PETITIONERS REPLY TO BRIEF FOR FIDELITY MORTGAGE INVESTORS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

NATURE OF THE REPLY

By reply to the Brief in Opposition of Respondents, Petitioners seek, with the Court's permission, to respond to certain new matter and clarify certain salient points reserving all arguments asserted in the Petition for Writ of Certiorari and the right to respond at a later date, in the event the Court grants the Petition, to numerous allegations in the Brief in Opposition

including but not limited to the assertion that Petitioners did not seek relief pursuant to Rule 11-44 (e), (Br. in Opp. p. 7), that Petitioners do not contest the deed of trust in issue (Br. in Opp. p. 21) or deny that property of the debtor is within the exclusive jurisdiction of the Chapter XI Court (Br. in Opp. p. 21) or any other matter wherein the Petition is in conflict with the Brief in Opposition.

ARGUMENT

A. JURISDICTION HAS NOT BEEN DEMONSTRATED

B. THE BANKRUPTCY COURT HAD NO JURISDICTION OF PETITIONERS OR THE SUBJECT MATTER

C. ALL ACTS OF FMI GIVING RISE TO THE FEDERAL PROCEEDING ARE WITHIN THE SCOPE OF 28 USC 959

D. THE CONFLICT OF INTEREST OF LEGAL COUNSEL FOR FMI IS CLEARLY ESTABLISHED

Jurisdiction Has Not Been Demonstrated

Respondent suggests that Petitioners have the burden to establish want of jurisdiction in the instant proceeding (Br. in Opp. p. 11), yet the presumption is that the courts below lack jurisdiction until it is demonstrated that jurisdiction exists. *Turner v. President, Directors and Co. of Bank of North America*, 4 Dall. 9, 1 L. Ed. 718 (1799).

Chapter XI of the Bankruptcy Act pursuant to Sec. 306, 11 USC 706 (App. 10a) defines a debtor to be a person under Sec. 22 of the Act. Sec. 22, 11 USC 1 (App. 2a, 4a) includes in pertinent part:

> "(8) "Corporation" shall include . . . any business conducted by a trustee or trustees wherein beneficial interest or ownership is evidenced by certificate or other written instrument;" and
>
> "(23) "Persons" shall include corporations, except where otherwise specified . . ."

which perhaps includes a real estate investment trust. In discovery proceedings continuing in the State Court proceeding between the Contractor and FMI, after preparation of Petitioner's Petition herein, Petitioners have been furnished documents that establish FMI is not at any time material hereto a real estate investment trust, notwithstanding the sworn Petition under Chapter XI filed January 30, 1975, alleging that it was a real estate investment trust, and thus the threshold issue of whether FMI is such an entity as could invoke the protection of the Bankruptcy Act is unanswered.

While there is a reference on Exhibit "A" attached to said Petition indicating FMI is a Massachusetts Business Trust, the Court of Appeals operated under the assumption FMI was in fact a real estate investment trust (Petition for Writ of Certiorari App. p. 2a) and to date FMI has refused to furnish in the State Court

proceedings any documents pertaining to the existence of a Massachusetts Business Trust other than an alleged copy of the declaration of same together with amendments thereto.

The Bankruptcy Court Had No Jurisdiction Of Petitioners Or The Subject Matter.

Respondent is apparently correct in asserting that holding non parties in civil contempt for violation of a rule is without precedent. Petitioners agree as stated by FMI that:

> ". . . a civil contempt is a *litigant's* failure to do something *ordered* to be done in a civil action for the benefit of the *opposing party therein.*" (emphasis added) (Br. in Opp. p. 10)

The difficulty here is that no order was entered* and neither the Contractor nor the Petitioners were parties to the Chapter XI proceeding or creditors of FMI.

Petitioners agree as stated by Respondent that to constitute contempt the order must be ". . . specific and definite . . ." (Br. in Opp. p. 10). To determine whether the "order" is specific and definite other

* On August 1975 under cover letters dated August 8, 1975 Contractor received a copy of the Order of the Bankruptcy Court dated February 28, 1975 (Br. in Opp. p. 9 footnote) setting the first meeting of the Creditors for March 17, 1975 (FMI first scheduled the Contractor as a Creditor on July 29, 1975). Same was offered in evidence by Affidavit of Petitioners before the District Court for the limited purpose of showing the date of notice to the Contractor. The judgments of the Courts below are based on violation of Rule 11-44 (App. to Petitioner for Writ of Certiorari, 3a, 4a, 5a, 9a, 10a, 21a, 33a, 36a, 42a, 45a, 47a, 48a, 55a).

issues must be resolved including: What property of FMI is involved?

FMI was the beneficiary of a deed of trust wherein the Developer conveyed to Mr. James Young, Trustee, a security interest in the real property (a leasehold estate) to secure the payment of a promissory note of the Developer payable to FMI. The only right of a beneficiary of a deed of trust (FMI) is, in the event of default, to cause the Trustee (Mr. James Young) to sell the property and apply so much of the proceeds therefrom as are secured by the deed of trust to the debt owing, *Baker v. Conn. General Life Ins. Co.*, 18 So.2d 438 (Miss. 1944), and that has been done in the instant case. The remaining $75,964.33, not secured by the deed of trust because of the lien of the Contractor, was delivered by Mr. James Young to the registry of the court in the federal proceeding for as the Honorable Walter L. Nixon, Jr. Judge of the United States District Court for the Southern District of Mississippi found after hearing the evidence on March 28, 1975:

> ". . . we have a question as to whether the above proceeds are the property of the bankrupt, that is, which lien preempts."

The best that can be said for the position of FMI assuming arguendo that there is an issue of which lien preempts, is that there is a substantial adverse claim to the funds. (During the hearing before the Bankruptcy Court on April 10, 1975 the Court stated: "I can say right now that it would be my opinion that title to this property should be tried in Mississippi . . ." of which FMI has never had title or possession and consequent-

ly the Bankruptcy Court does not acquire jurisdiction thereof. (*Loyd v. Stewart and Nuss*, 327 F2d 642 (9th Cir. 1964).

In *Freed and Co. v. Akron National Bank and Trust*, 534 F2d 1235 (6th Cir. 1976) relied upon by Respondent the Court held specifically that the commencement of a Chapter XI proceeding did not oust the prior jurisdiction of a State Court proceeding to enforce a lien against property of the debtor, but that the bankruptcy court could, after hearing and determining the existence of equity in the property for the debtor, stay the *enforcement* of the lien. In the instant case the Contractor has sought only to preserve and protect its lien and there is no issue of equity for its lien is in the amount of $75,964.33. In this connection, it has long been the law that a Chapter XI proceeding does not oust the state court of jurisdiction to enforce a lien against the property of the *debtor* valid under 11 USC 107. (App. Petition for Writ of Certiorari 59a). *Yoshinuma v. Oberdorfer*, 136 F2d 460 (5th Cir. 1943).

As all rights of Respondent as a beneficiary of the deed of trust were already at issue in the State Court proceeding, the Bankruptcy Court has no jurisdiction to enjoin a foreclosure action because the title to the property is in a third person (developer), *Union Central Life Insurance Co. v. Baer Co. Ltd.*, 10 F2d 153 (5th Cir. 1925), but even if title were in FMI, still there is no jurisdiction to restrain the Contractor, *McGonigle v. Foutch*, 51 F2d 455 (8th Cir. 1931), because the rationale for staying secured creditors to the effect that such a

creditor extends credit to the debtor subject to the contingency that proceedings in Bankruptcy against the debtor may deprive him of the specific remedy contemplated in his contract, 1 Collier, *Bankruptcy*, §2.62(2) p. 336 (14th Ed 1968) is not applicable.

A major distinction between a Chapter X proceeding and a Chapter XI proceeding is that a Chapter X Court may stay lien enforcement on property of the Debtor pursuant to 11 USC 516(4) which provides in pertinent part:

> "Upon the approval of a petition, the judge may, in addition to the jurisdiction, powers and duties in this chapter conferred and imposed upon him and the court —
>
> (4) in addition to the relief provided by section 29 of this title, enjoin or stay until final decree the commencement or continuation of a suit against the debtor or its trustee or proceeding to enforce a lien upon the property of the debtor."

whereas a Chapter XI Court has no jurisdiction to stay lien enforcement against property of the debtor except after notice and for cause shown pursuant to 11 USC 714 which provides in pertinent part as follows:

> "The court may, in addition to the relief provided by section 29 of this title and elsewhere under this chapter, enjoin or stay until final decree the commencement or continua-

> tion of suits other than suits to enforce liens upon the property of a debtor, and may, upon notice and for cause shown, enjoin or stay until final decree any act or the commencement or continuation of any proceeding to enforce any lien upon the property of a debtor."

It appears Congress has not intended that any bankruptcy court has jurisdiction to stay lien enforcement against property that is not the Debtor's; at least in the case of competing liens on property owned by a third person that is the rule in the Fifth Circuit. *Union Central Life Insurance Co. v. Baer Co., Ltd., supra.*

All Acts Of FMI Giving Rise To The Federal Proceeding Are Within The Scope Of 28 USC 959

The decision *In the Matter of Investors Funding Corp. of New York et al* (2nd Cir. December 15, 1976 (No. 76-5019), Slip Op. 983), a Chapter X corporate reorganization relied upon by Respondent (Br. in Opp. p. 33, 35-36) is a variance with the holding in the instant case. There Jaytee was the owner of property subject to a wrap around mortgage which wrapped around an underlying mortgage. The wrap around mortgage was the property of IFC which subsequently commenced a Chapter X corporate reorganization. Jaytee made a payment to the Trustee of IFC who in turn failed to timely make payment on the underlying mortgage. Jaytee commenced a lawsuit in the state court in New York for damages and to unwrap the said mortgage. During the pendency of the suit, Jaytee failed to make payments to the IFC on the wrap-

around, but did pay directly the underlying lien. IFC, represented by the same firm representing Respondent herein, rather than attempting to rely upon Rule 10-601 of the Chapter X Rules (App. 11a) which provides for automatic stay similar to Rule 11-44, sought and obtained a temporary restraining order. Upon hearing the Court made permanent the injunction and ordered Jaytee to pay owner the funds withheld aforesaid.

The Court of Appeals held that the "unquestioned" power of a Chapter X court to enjoin proceedings is indeed subject to question in the following language:

> "This power is limited, however, in situations in which the trustee or a debtor in possession is carrying on the business connected with the property entrusted to him."

The Court then notes that the apparent conflict between §116 (4), 11 USC 516 (4) supra granting authority to enjoin all lawsuits and 28 USC 959 (Petition for Writ of Certiorari p. 27) which permits suits without leave of the Court subject to the right of the Court to subsequently stop such suits when necessary to the ends of justice can be harmonized by a construction providing that an action against a debtor relating to its business activities may proceed ". . . unless the bankruptcy court, exercising sound discretion, finds the action would embarrass, burden, delay or otherwise impede the reorganization proceedings." and concludes that even though the value of the estate might be reduced, that alone is not sufficient to justify the injunction. The Court then concludes that before a Chapter X Court enjoins a lawsuit: "It must decide

first whether the lawsuit relates to "routine" business activities of the debtor that are carried on by the trustee."

In the instant case, the Petition under Chapter XI of FMI recites that FMI is in the business of "lending for construction and development of real estate, and in ownership and the attendant operations of ownership of real property." Mr. James Young testified before the Bankruptcy Court on April 10-11, 1975 that he commenced the foreclosure proceedings prior to the filing of the Chapter XI petition, that there was then a delay pending further negotiation with the Developer at the conclusion of which he resumed the foreclosure proceedings and that such proceedings were unrelated to the filing of Chapter XI petition, FMI purchased the property at the foreclosure sale, remodeled same from condominium units to apartment units and to this date operates same as an apartment project. The Bankruptcy Court concluded that the federal proceeding complaining of the manner in which the foreclosure was being conducted was not related to the operation of FMI's business. That it was only liquidating its estate. There is, however, no evidence that the Bankruptcy Court authorized such liquidation as required by 11 USC 713 (App. 10a).

Assuming arguendo, that the Bankruptcy Court is correct, how can it be said as a matter of law that Petitioners would know on March 24, 1975, that the foreclosure was not related to routine business activities? As that question awaited subsequent determination by the Bankruptcy Court, where is the order so specific that it could not leave any doubt in the minds of Petitioners as to the conduct proscribed?

As to the money ordered by the lower court to be paid to Jaytee in *Investors Funding Corp., supra*, the Court of Appeals speaking through the Honorable Judge Oaks said:

> "Judge Bonsal understandably hoped to save all the parties the expense of an additional action by cutting through legal "rights" to reach what would seem to the casual observer a very equitable and practical solution to the controversy, but he simply lacked the power to do so here."

In the instant case the Court of Appeals cut through the legal rights of the Contractor by classifying it as a creditor seeking to enhance its position in the reorganization. (App. Pet. for Writ of Cert. p. 19a).

The holding in *Investors Funding Corp., supra*, to the effect that a lawsuit involving a promissory note and mortgage securing same in existence prior to the bankruptcy proceeding is not automatically enjoined is the virtual antithesis of the instant case wherein the Court concludes that only a suit relating to an obligation arising after the commencement of the Bankruptcy Court proceedings may be brought without leave of the Court. *Investors Funding Corp., supra*, is the better reasoned of the two cases for it is predicated upon the act of the Trustee in failing to make payment on the underlying lien even though the obligation was one created prior to the existence of the Chapter X proceeding; that is, the distinction is the date upon which the event complained of occurs rather than the date upon which the relationships of the parties is established.

And now we have reached the gravamen of the offense of FMI which gives rise to the federal proceeding pursuant to 28 USC 959 for while Respondents Brief in Opposition suggests that Petitioner's allegation that FMI has committed a tort in the conduct of the foreclosure is an afterthought (Br. in Opp. p. 9) the record will reflect that:

1. In the Complaint in the federal proceeding which is the basis of this contempt proceeding it is alleged in paragraph 10: ". . . the notice of sale was not posted for three weeks prior to said sale, as required by the laws of the State of Mississippi;"

2. At the commencement of the hearing in the federal proceeding as counsel for Contractor was making his opening statement and remarked that the Contractor ". . . believes that the defendant has not complied with the laws of the State of Mississippi for foreclosure . . ." the Court interrupted and stated: "All right. Under the circumstances and due to the exigency of the situation, to deny Plaintiff the right to proceed at this time would be denying him his day in court to a moot question; . . ."

3. Prior to the hearing in the Bankruptcy Court on April 10, 1975, Petitioner filed a Response to the show cause order of said Court stating at page 4 thereof:

   ". . . that Mississippi law requires that the substituted trustee's notice of sale be continuously posted on the bulletin board

provided for that purpose at the courthouse of the county in which the property is located for a given period of time as provided according to Mississippi law but that FMI wholly failed to comply in so posting . . ."

4. At the hearing before the Bankruptcy Court, Petitioners offered in evidence an affidavit establishing that the notice of the sale was not posted on March 18, 1975 and produced for the Bankruptcy Court the applicable Mississippi statute after the reading of which the Court stated:

   "I am not familiar with Mississippi Law. I will just accept it for what it says without trying to construe it in any way;"

5. The brief filed by Petitioner in the Bankruptcy Court argued that failure to comply with Mississippi law constituted a tort.

6. The same arguments were presented in the pleadings before the District Court and in oral argument before said Court after Petitioners were refused the right to put on oral evidence; Petitioners asserting that the failure to comply with Mississippi law constituted a tort. (There is no record of the proceeding before the District Court); and again

7. at page 33 of the Brief of Appellants filed in the Court of Appeals Petitioners complained; ". . . of the tort of FMI visited upon the Joint Venture (Contractor) in failing to give proper notice of the sale.

The applicable statute is §89-1-55 Mississippi Code Ann. of 1972 (App. p. 14a), and it has been held in *McAllister et. al. v. Byrd*, 55 So.2d 435 (Supreme Court of Miss. Div. 'B' 1951) that where notice of the sale was posted continuously at the courthouse door from May 19 through date of sale on June 12, the trustee had complied with the statute. In the instant case it is uncontroverted that the notice was not continuously posted for three consecutive weeks prior to the sale on March 27 or 28, 1975. In addition, Mr. Young, Trustee, represented that he would sell good title when in fact the deed of trust lien reached only a leasehold estate.

Of course, as is provided in 28 USC 959, the Trustee's sale of the property in issue must be conducted in accordance with Mississippi law.

The Conflict Of Interest Of Legal Counsel For FMI Is Clearly Established

The assertion by Respondent to the effect that the allegation of conflict of interest is patently false (Br. in Opp. p. 47 footnote) is confusing in light of the record of the proceedings. Petitioners admittedly read a four line article in the Wall Street Journal on or about January 31, 1975, indicating Fidelity Mortgage had filed for bankruptcy. This information was communicated to Mr. Crockett, Mississippi counsel for the Contractor and he was asked to verify same. Mr. Young was served in the federal proceeding on March 25, 2975, and at time of hearing thereon on March 26,

1975, produced and offered in evidence a copy of the January 31, 1975 Wall Street Journal concerning FMI. The production of the newspaper article discussed only with Mr. Crockett seemed curious at the time, but before the Bankruptcy Court on April 11, 1975, Mr. Young testified on cross examination:

> "Well, if I am to be technical with Mr. Hubbard, I don't know whether it was or not but on or about that date Mr. Crockett, *who was then associated with me in the matter* (i.e. foreclosure) called me and informed me that he was at the Rankin County Courthouse and could not find the notice on the board."

The date of said call would have been March 18, 1975. It was on Thursday, March 20, 1975, while Petitioners were in Mississippi to discuss the defense of the lawsuit brought by Mr. Young's partners on behalf of the subcontractors against Contractor that Mr. Crockett first mentioned the possibility of a Chapter XI proceeding by producing a copy of the unsworn plea in abatement alleging a Chapter XI proceeding but giving no cause number therefore (Petition for Writ of Certiorari p. 20-21); Mr. Crockett having previously caused Petitioners to believe there was no such proceeding. Mr. Crockett further advised for the first time on March 20, 1975, that the property was posted for foreclosure, that the foreclosure sale was set for March 27, 1975, and that the foreclosure had not been properly posted. On Friday, March 21, 1975, Petitioners were again in Houston and it was on that date that they attempted without success to confirm the existence of the Chapter XI proceedings in New York by calling the Clerk of the Court. Petitioners were then left in the posture that if they were to obtain

any relief in Mississippi, pleadings would have to be on file by Monday morning, March 24, 1975, in order to obtain a hearing date prior to March 27, 1975 and to effect service. In the event Petitioners had gone to New York to verify the existence of the Chapter XI proceeding and had found there was no such proceeding on Monday, March 24, 1975, they would have been presented with a fait accompli. Accordingly, it does appear that the conflict of interest existing between Mr. Young and Mr. Crockett is a proximate cause of the factual development of the instant proceeding.

CONCLUSION

The Court below has decided this case on a narrow procedural issue: That a creditor of a developer with a mechanics lien on the property of the developer in Mississippi must obtain leave of the Bankruptcy Court in New York in order to preserve and protect its mechanics lien where a lender who is a creditor of the developer and also has a lien on the property of the developer invokes the protection of Chapter XI of the Bankruptcy Act and then seeks to alter the status quo by causing a fourth party, the Trustee of a deed of trust, to commence foreclosure proceedings at variance with Mississippi law.

Respondent attempts to support the decision by relying upon Part VII of the Bankruptcy Rules (Br. in Opp. p. 41), but Bankruptcy Rule 701 (App. 13a) and the Advisory Committee's Note thereto make clear that Part VII is applicable only in the event the Contractor elects to consent to the jurisdiction of the Bankruptcy Court. Similarly. *In Re: Westec*, 460 F2d 1139 (5th Cir.

1972) is inapplicable as same involves a Chapter X corporate reorganization; a mortgage under Florida State law and is decided on principals of equity; that is that it would be unconscionable for the debtor to lose a property interest worth nearly a quarter of a million dollars in order to recognize a tax foreclosure by a water district for the amount of twenty dollars.

As stated by the Court of Appeals herein:

> "The issue here is a procedural one: whether Camelia and Farnale should have secured permission from the New York Bankruptcy Court before proceeding with their action in Mississippi. Rule 11-44 required Camelia and Farnale to secure such prior permission." (Petition for Writ of Certiorari, p. 20a-21a)

The holding would be in direct conflict with 28 U.S.C. 959 which provides for suit without leave of the Court had not the Court rejected the argument of the Petitioners in connection therewith.

Assuming, arguendo, that the Court has correctly decided the issue of the applicability of 28 U.S.C. 959, the effect of the decision is that any attorney who seeks to bring suit pursuant to 28 U.S.C. 959: must, as the Court notes in its opinion: ". . . be prepared to confront the consequences." (Petition for Writ of Certiorari p. 22a) If a Court subsequently determines the attorney has properly brought suit under 28 U.S.C. 959, he has discharged his duty to both his client and the legal system by zealously representing his client pursuant to the Rules Governing the State Bar of Texas. If, on

the other hand, a Bankruptcy Court (which is a court of equity; *In Re: Westec, supra*,) subsequently determines the suit is not maintainable under 28 U.S.C. 959, then the attorney must pay to the defendant therein $20,701.44 for his contempt and this result notwithstanding this Court's prior decision in *Maness v. Meyers*, 419 U.S. 449, 42 L.Ed. 574, 95 S. Ct. 584 (1975).

Such a result may have the effect of nullifying the provisions of 28 U.S.C. 959 which was enacted to contract the jurisdiction of bankruptcy courts, 6 Collier, *Bankruptcy* § 3.31(2) at 647 (14th Ed. 1972).

For the foregoing reasons as well as those which have been argued in the petition, certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the prescribed number of copies of the foregoing Petitioner's Reply Brief have been served on Weil, Gotshal & Manges, (Mr. Michael L. Cook, Mr. Richard P. Krasnow and Mr. Phillip H. Kalban), Attorneys for Respondent, Fidelity Mortgage Investors, 767 Fifth Avenue, New York, New York 10022, this ____ of February, 1977.

JEFFREY H. HUBBARD

APPENDIX

11 U.S.C. §1

CHAPTER 1. — DEFINITIONS

§ 1. *Meaning of words and phrases*

The words and phrases used in this title and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows:

(1) "A person against whom a petition has been filed" shall include a person who has filed a voluntary petition;

(2) "Adjudication" shall mean a determination, whether by decree or by operation of law, that a person is a bankrupt;

(3) "Appellate courts" shall include the United States courts of appeals and the Supreme Court of the United States;

(4) "Bankrupt" shall include a person against whom an involuntary petition or an application to revoke a discharge has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt;

(5) "Bona-fide purchaser" shall include a bona-fide encumbrancer or pledgee and the transferee, immediate or mediate, of any of them;

(5a) "Circuit" shall mean judicial circuit;

(6) "Clerk" shall mean the clerk of a court of bankruptcy;

(7) "Conceal" shall include secrete, falsify, and mutilate;

(7a) "Conference" shall mean the Judicial Conference of the United States;

(8) "Corporation" shall include all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships and shall include partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association, joint-stock companies, unincorporated companies and associations, and any business conducted by a trustee or trustees wherein beneficial interest or ownership is evidenced by certificate or other written instrument;

(8a) "Council" shall mean the Judicial Council of the circuit;

(9) "Court" shall mean the judge or the referee of the court of bankruptcy in which the proceedings are pending;

(10) "Courts of bankruptcy" shall include the United States district courts and the district courts of the Territories and possessions to which this title is or may hereafter be applicable;

(11) "Creditor" shall include anyone who owns a debt, demand, or claim provable in bankruptcy, and

may include his duly authorized agent, attorney, or proxy;

(12) "Date of adjudication" shall mean the date of the filing of any petition which operates as an adjudication, or the date of entry of a decree of adjudication, or if such decree is appealed from, then the date when such decree is finally confirmed or the appeal is dismissed;

(13) "Date of bankruptcy", "time of bankruptcy", "commencement of proceedings", or "bankruptcy", with reference to time, shall mean the date when the petition was filed;

(14) "Debt" shall include any debt, demand, or claim provable in bankruptcy;

(14a) "Director" shall mean the Director of the Administrative Office of the United States Courts;

(15) "Discharge" shall mean the release of a bankrupt from all of his debts which are provable in bankruptcy, except such as are excepted by this title;

(16) "Document" shall include any book, deed, record, paper, or instrument in writing;

(17) "Farmer" shall mean an individual personally engaged in farming or tillage of the soil, and shall include an individual personally engaged in dairy farming or in the production of poultry, livestock, or poultry or livestock products in their unmanufactured state, if the principal part of his income is derived from any one or more of such operations;

(18) "Holiday" shall include New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Veterans Day, Christmas Day, and any day appointed as a holiday or as a day of public fasting or thanksgiving by the President or the Congress of the United States, or by the Governor or the Legislature of the State in which the proceeding under this title is filed or pending;

(19) A person shall be deemed insolvent within the provisions of this title whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not at a fair valuation be sufficient in amount to pay his debts;

(20) "Judge" shall mean a judge of a court of bankruptcy, not including the referee;

(21) "Oath" shall include affirmation;

(22) "Officer" shall include clerk, marshal, receiver, custodian, referee, and trustee, and the imposing of a duty upon, or the forbidding of an act by, any officer shall include his successor and any person authorized by law to perform the duties of such officer;

(23) "Persons" shall include corporations, except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are forbidden under this title shall include persons who are participants in the forbidden acts, and the agents, officers, and members

of the board of directors or trustees or of other similar controlling bodies of corporations;

(24) "Petition" shall mean a document filed in a court of bankruptcy or with a clerk thereof initiating a proceeding under this title;

(25) "To record" shall include to register or to file for record or registration;

(26) "Referee" shall mean the referee who has jurisdiction of the case or to whom the case has been referred or anyone acting in his stead;

(27) "Relatives" shall mean persons related by affinity or consanguinity within the third degree as determined by the common law and shall include the spouse;

(28) "Secured creditor" shall include a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under this title or who owns such a debt for which some endorser, surety, or other person secondarily liable for the bankrupt has such security upon the bankrupt's assets;

(29) "States" shall include the Territories and possessions to which this title is or may hereafter be applicable, Alaska, and the District of Columbia;

(29a) "Statutory lien" shall mean a lien arising solely by force of statute upon specified circumstances or conditions, but shall not include any lien provided by or dependent upon an agreement to give security, whether or not such lien is also provided by

or is also dependent upon statute and whether or not the agreement or lien is made fully effective by statute.

(30) "Transfer" shall include the sale and every other and different mode, direct or indirect, of disposing of or of parting with property or with an interest therein or with the possession thereof or of fixing a lien upon property or upon an interest therein, absolutely or conditionally, voluntarily or involuntarily, by or without judicial proceedings, as a conveyance, sale, assignment, payment, pledge, mortgage, lien, encumbrance, gift, security, or otherwise; the retention of a security title to property delivered to a debtor shall be deemed a transfer suffered by such debtor;

(31) "Trustee" shall include all of the trustees and "receiver" shall include all of the receivers of an estate;

(32) "Wage earner" shall mean an individual who works for wages, salary, or hire, at a rate of compensation not exceeding $1,500 per year;

(33) Words importing the masculine gender may be applied to and include all persons;

(34) Words importing the plural number may be applied to and mean only a single person or thing; and

(35) Words importing the singular number may be applied to and mean several persons or things. July 1, 1898, c. 541, § 1, 30 Stat. 544; Apr. 12, 1900, c. 191, § 34, 31 Stat. 84; Mar. 3, 1909, c. 269, § 1, 35 Stat. 838; May 27,

1926, c. 406, § 1, 44 Stat. 662; June 7, 1934, c. 426, 48 Stat. 926; June 25, 1936, c. 804, 49 Stat. 1921; June 22, 1938, c. 575, § 1, 52 Stat. 840; June 28, 1946, c. 512, § 1, 60 Stat. 323; July 7, 1952, c. 579, § 1, 66 Stat. 420; June 23, 1959, Pub.L. 86-64, § 1, 73 Stat. 109.

* * * *

§ 516. Same; additional jurisdiction over administration of estate

Upon the approval of a petition, the judge may, in addition to the jurisdiction, powers, and duties in this chapter conferred and imposed upon him and the court —

(1) permit the rejection of executory contracts of the debtor, except contracts in the public authority, upon notice to the parties to such contracts and to such other parties in interest as the judge may designate;

(2) authorize a receiver, trustee, or debtor in possession, upon such notice as the judge may prescribe and upon cause shown, to issue certificates of indebtedness for cash, property, or other consideration approved by the judge, upon such terms and conditions and with such security and priority in payment over existing obligations, secured or unsecured, as in the particular case may be equitable;

(3) authorize a receiver or a trustee or a debtor in possession, upon such notice as the judge may prescribe and upon cause shown, to

lease or sell any property of the debtor, whether real or personal, upon such terms and conditions as the judge may approve; and

(4) in addition to the relief provided by section 29 of this title, enjoin or stay until final decree the commencement or continuation of a suit against the debtor or its trustee or any act or proceeding to enforce a lien upon the property of the debtor;

(5) Notwithstanding any other provisions of this chapter, the title of any owner, whether as trustee or otherwise, to aircraft, aircraft engines, propellers, appliances, and spare parts (as any of such are defined in the Civil Aeronautics Act of 1938, as now in effect or hereafter amended) leased, subleased, or conditionally sold to any air carrier which is operating pursuant to a certificate of convenience and necessity issued by the Civil Aeronautics Board, and any right of such owner or of any other lessor to such air carrier to take possession of such property in compliance with the provisions of any such lease or conditional sale contract shall not be affected by the provisions of this chapter if the terms of such lease or conditional sale so provide.

(6) Notwithstanding any other provisions of this chapter, the title of any owner, whether as trustee or otherwise, to vessels (as the term is defined in the Ship Mortgage Act, 1920, as now in effect or hereafter amended) leased,

subleased, or conditionally sold to any water carrier which holds a certificate of public convenience and necessity or permit issued by the Interstate Commerce Commission. and any right of such owner or of any other lessor to such water carrier to take possession of such property in compliance with the provisions of any such lease or conditional sale contract shall not be affected by the provisions of this chapter if the terms of such lease or conditional sale so provide.

July 1, 1898, c. 541, § 116, as added June 22, 1938, c. 575, § 1, 52 Stat. 885, and amended Sept. 4, 1957, Pub.L. 85-295, 71 Stat. 611, Oct. 17, 1968, Pub.L. 90-586, § 2, 82 Stat. 1149.

* * * *

SUBCHAPTER II — DEFINITIONS

§ *706. In general*

For the purposes of this chapter, unless inconsistent with the context —

(1) "arrangement" shall mean any plan of a debtor for the settlement, satisfaction, or extension of the time of payment of his unsecured debts, upon any terms;

(2) "consideration" shall include evidences of indebtedness, either secured or unsecured, stock and certificates of beneficial interest therein, and certificates of beneficial interest in property;

(3) "debtor" shall mean a person who could become a bankrupt under section 22 of this title and who files a petition under this chapter;

(4) "executory contracts" shall include unexpired leases of real property; and

(5) "petition" shall mean a petition filed under this chapter by a debtor proposing an arrangement.

July 1, 1898, c. 541, § 306, as added June 22, 1938, c. 575, § 1, 52 Stat. 906.

* * * *

§ 713. Same; administration of estate

Upon the filing of a petition, the court may, in addition to the jurisdiction, powers, and duties conferred and imposed upon it by this chapter —

(1) permit the rejection of executory contracts of the debtor, upon notice to the parties to such contracts and to such other parties in interest as the court may designate;

(2) upon such notice as the court may prescribe and upon cause shown, authorize the receiver or trustee, or the debtor in possession, to lease or sell any property of the debtor, whether real or personal, upon such terms and conditions as the court may approve;

(3) whenever under this chapter the court is required or permitted to fix a time for any purpose, the court may upon cause shown extend such time.

July 1, 1898, c. 541, § 313, as added June 22, 1938, c. 575, § 1, 52 Stat. 906.

* * * *

Rule 10-406 BANKRUPTCY RULES — CHAPTER 10

(b) Unclaimed Money and Securities. Unless otherwise provided in the plan, the securities or cash remaining unclaimed at the expiration of the bar date fixed pursuant to Rule 10-405(b), or any extension thereof, shall be delivered to the new corporation acquiring the assets of the debtor under the plan, if any, otherwise to the reorganized debtor.

* * * *

PART V. COURTS OF BANKRUPTCY; OFFICERS AND PERSONNEL; THEIR DUTIES

Rule 10-501. Administrative Matters

Part V of the Bankruptcy Rules applies in Chapter X cases except that Rule 509(a) thereof shall include the following additional sentence: "If a Chapter X case is not referred pursuant to Rule 10-103(a), all papers shall be filed with the clerk of the district court or as directed by local rule or order of the district judge."

* * * *

PART VI. PROPERTY OF THE ESTATE

Rule 10-601. Petition as Automatic Stay of Actions Against Debtor and Lien Enforcement

(a) Stay of Actions and Lien Enforcement. A petition filed under Rule 10-104 or 10-105 shall operate as a stay of the commencement or the continuation of any court or other proceeding against the debtor, or the enforcement of any judgment against it, or of any act or the commencement or continuation of any court proceeding to enforce any lien against its property, or of any court proceeding for the purpose of the rehabilitation of the debtor or the liquidation of its estate.

(b) Duration of Stay. Except as it may be terminated, annulled, modified, or conditioned by the bankruptcy court under subdivision (c), (d), or (e) of this Rule, the stay shall continue until the case is closed, dismissed or converted to bankruptcy or the property subject to the lien is, with the approval of the court, abandoned or transferred.

(c) Relief from Stay. On the filing of a complaint seeking relief from a stay provided by this rule, the bankruptcy court shall, subject to the provisions of subdivision (d) of this rule, set the trial for the earliest possible date, and it shall take precedence over all matters except older matters of the same character. The court may, for cause shown, terminate, annul, modify, or condition such stay. A party seeking continuation of a stay against lien enforcement shall show that he is entitled thereto.

(d) Ex Parte Relief from Stay. On the filing of a complaint seeking relief from a stay against any act or proceeding to enforce a lien or any proceeding commenced for the purpose of rehabilitation of the debtor or the liquidation of its estate, relief may be granted without written or oral notice to the adverse party if (1)

it clearly appears from specific facts shown by affidavit or by a verified complaint that immediate and irreparable injury, loss, or damage will result to the plaintiff before the adverse party or attorney can be heard in opposition, and (2) the plaintiff's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. The party obtaining relief under the subdivision shall give written or oral notice thereof as soon as possible to the debtor, the trustee, receiver, or debtor in possession or, if none has been designated or qualified, to the petitioner or petitioners and, in any event, shall forthwith mail to such person or persons a copy of the order granting relief. On 2 days' notice to the party who obtained relief from a stay provided by this rule without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its reinstatement, and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(e) Availability of Other Relief. Nothing in this rule precludes the issuance of, or relief from, any stay, restraining or injunction order when otherwise authorized.

* * * *

Rule 701: Scope of Rules of Part VII

The rules of this Part VII govern any proceeding instituted by a party before a bankruptcy judge to (1) recover money or property, other than a proceeding under Rule 220 or Rule 604, (2) determine the validity, priority, or extent of a lien or other interest in property, (3) sell property free of a lien or other interest for

which the holder can be compelled to take a money satisfaction, (4) object to or revoke a discharge, (5) obtain an injunction, (6) obtain relief from a stay as provided in Rule 401 or 601, or (7) determine the dischargeability of a debt. Such a proceeding shall be known as an adversary proceeding.

* * * *

REAL AND PERSONAL PROPERTY
(Mississippi Code Ann. of 1972)

§ *89-1-55. How lands sold under mortgages and deeds in trust.*

All lands comprising a single tract, and wholly described by the subdivisions of the governmental surveys, sold under mortgages and deeds of trust, shall be sold in the manner provided by section one hundred eleven of the constitution for the sale of lands in pursuance of a decree of court, or under execution. All lands sold at public outcry under deeds of trust or other contracts shall be sold in the county in which the land is located, or in the county of the residence of the grantor, or one of the grantors in the trust deed, provided that where the land is situated in two or more counties, the parties may contract for a sale of the whole in any of the counties in which any part of the land lies. Sale of said lands shall be advertised for three consecutive weeks, preceding such sale, in a newspaper published in the county, or, if none is so published, in some paper having a general circulation therein, and by posting one notice at the courthouse of the county where the land is situated, for said time, and such notice and advertisement shall disclose the name of the original mortgagor or mortgagors in said deed of trust or other contract. No sale of lands under a deed

of trust or mortgage, shall be valid unless such sale shall have been advertised as herein provided for, regardless of any contract to the contrary. An error in the mode of sale such as makes the sale void will not be cured by any statute of limitations, except as to the ten-year statute of adverse possession.